THE CONVEYANCER AND PROPERTY LAWYER

VOL. 22, No. 4 JULY—AUGUST, 1958

CONVEYANCER'S NOTEBOOK

STANDARD LEASE CLAUSES

There has been a rather interesting correspondence in the *Law Society's Gazette* on the above subject. Mr. Thomas Woodcock pointed out that the Leases Act, 1845, had not been adopted by the profession but that his firm had procured a client to execute a deed poll containing standard forms of covenant, the deed being enrolled in the Central Office, and the form had been used quite satisfactorily for many years. Mr. Theodore B. F. Ruoff drew more detailed attention to the Act and pointed out that in other parts of the British Commonwealth similar Acts were in force and were used, and he is supported in this by other writers. It seems clear that the Acts of other British Parliaments have been inspired by the 1845 Act. The correspondence also appears to show that the profession is now ready to adopt the 1845 Act or a similar one, and the Law Society might well think it in the interests of the profession that a new Bill on the same lines should be promoted. It seems pessimistic to assume that such a Bill, which would obviously be unopposed, would take a great deal of time in being passed. Alternatively, if the Law Society were to establish standard forms of clauses they could be adopted without awaiting the passing of a new Act.

As Mr. Ruoff pointed out, it is very interesting to note that section 3 of the 1845 Act made express provision that, in taxing any bill for preparing a lease applying the Act, the taxing officer is required to consider not the length of the deed but only the skill and labour employed and responsibility incurred in the preparation thereof. The Act seems, therefore, to have been considerably in advance of its time and it is little short of astonishing that it has not been adopted by the profession.

Tax Planning for the Solicitor

We might also draw attention to the paper prepared by Master G. S. A. Wheatcroft and Mr. P. M. Christopherson on the above subject which has been reproduced in the *Law Society's Gazette* for June. The paper does not deal in detail with taxation points but draws attention to some of the subjects—and they are, indeed, numerous and varied—where a solicitor must turn his mind to the implications of the taxation provisions affecting the subject. Any practising solicitor who can read the paper and say in honesty that he would have in mind all the points suggested by the authors can congratulate himself on being an expert on the subject. We can recommend the paper as being of considerable value. Those who do not yet appreciate the importance of tax planning may receive a shock and even those who do appreciate it are certain to learn a great deal.

Duties of Solicitors

In *Edwards* v. *Edwards* [1958] 2 W.L.R. 956, Sachs J. made an order for costs against a solicitor personally because of the solicitor's failure to stop proceedings at a stage when he should have known that they had no chance of success. The solicitor was acting for a wife who was applying under the Matrimonial Causes Act 1950, s. 23, for maintenance, and she had been granted a civil aid certificate. The judgment deserves very careful consideration as it seems clear that the obligation on solicitors is being increased, although few would quarrel with the actual decision of the court in the case. First, the learned judge took the view that before such proceedings are instituted the solicitor acting for the wife should make proper inquiries as to the means and so on of the husband, and as the solicitor did not make proper inquiries he came to the conclusion that probably the commencement of the litigation was unreasonable, but, as there had never been a reported case on that particular point, he decided not to impose any penalty on the solicitor for his conduct at that stage.

Where a litigant is granted a civil aid certificate to take proceedings it seems rather odd that the solicitor must decide whether it is reasonable for him to take those proceedings. In any contemplated proceedings, whether civilly aided or not, if the solicitor decides against them presumably the litigant must conduct his proceedings in court personally. Indeed, in the case of a limited company the company would be entirely debarred from access to the courts. Furthermore, in a civil aid case, so far as we are aware, costs incurred to decide whether the assisted person has a

good cause of action do not come out of the Legal Aid Fund, so that, in effect, those costs would fall on the solicitors personally unless the other side agreed to pay them.

Fusion of the Administration of Law and Equity

It is over seventy-five years since the Judicature Act was passed but it still seems that the different Divisions of the High Court are separate courts for many purposes. We have recently seen a number of proceedings with regard to guardianship and custody of infants which rather underlines the often very expensive nature of these proceedings. It is said that the jurisdiction of the Chancery Division is superior to that of the Divorce Division, in that, in the case of the former, it can effectively prevent the child from leaving the United Kingdom, but this is really not so as there is nothing to prevent any child being taken from England to Eire without anyone's consent and the immigration authorities can do nothing to stop the child leaving in this way. Once the child is in Eire the English court no longer has any control. What is perhaps rather more surprising is the comparatively few occasions on which the court sees either the parents or the child and arrives at its conclusion purely on affidavit evidence.

To many practitioners it would seem that the existing jurisdiction with regard to infants is very expensive and cumbersome and there is a good deal to be said for giving the jurisdiction to the county court so that, perhaps, after a divorce questions with regard to access and custody of infants might be left to the decision of the county court. The expense of applications to have the child for holidays and so on would be very much reduced.

Another recent case which is of interest as showing the relation between the different Divisions is *Re Richardson's Will Trusts* [1958] 2 W.L.R. 414. The Divorce Court made an order charging the interest of the husband under a will to secure maintenance for the wife. The Chancery Division then decided that the effect of this was to bring about a forfeiture of the husband's interest. If this was intended by the Divorce Court it seems a rather odd exercise of jurisdiction. If it was not intended, might it not have been better if the matter could have been referred back to the Divorce Court so that it could, if necessary, amend the order? A perusal of the facts will show that it is hardly likely that the husband, in the particular circumstances, would wish to go back to the Divorce Court.

HOW THE RENT ACT IS WORKING IN ENGLAND AND WALES

By H. Symon, c.b.,
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Association of Land and Property Owners

It will be recalled that the Rent Act, 1957, had two main objectives: first, to allow an increase in the rent of houses so that landlords could afford to maintain them in good repair and derive a reasonable income; and, secondly, to establish a sizable free market in rented homes, so as to permit movement to ensure the fuller use of under-occupied houses and to facilitate modernisations and improvements. Accordingly, the Act provides that where the rateable value of a house is £40 or less in London and £30 or less elsewhere (and power was taken to reduce the figures at later dates by Parliamentary orders) the rent can be increased up to a specified limit, though remaining controlled. Where the rateable value is higher, the house is decontrolled, subject to 15 months standstill period. During this standstill period, the landlord cannot obtain possession; neither can he increase the rent unless he gives the tenant a new lease not terminable by the landlord within three years. It is therefore most convenient to examine the operation of the Act in two parts (a) controlled lettings, (b) decontrolled lettings.

Controlled Lettings

About 4¼ million houses in England and Wales remain controlled for the time being, and their rents, unless already higher, can be raised to a new limit. This limit is twice the gross value as assessed for rating purposes, if the tenant is not contractually responsible for any repairs apart from internal decorations. It lies between 2 and 1⅓ times the gross value if the tenant is partially liable for such repairs. (If the landlord is responsible for internal decorative repairs or elects so to be, the " appropriate factor " of the gross value is 2⅓ reducible to 1⅔, depending on the tenant's responsibility for repairs.) To this figure must be added the rates if borne by the landlord and the reasonable charge for such services (*e.g.*, constant hot water and central heating) as the landlord may provide. The landlord has to serve three months' notice of increase of rent and no increase can exceed 7s. 6d. per week for the first six months.

Landlords were not in a position to serve the notices until they could cite the rent limit. This meant that they had first to decide whether to elect to be responsible for internal decorations if not already liable. Next they had to check the gross value. In cases where the rooms let were not separately rated, they had to agree an apportionment with the tenant or refer it to the county court. If the house were combined with a shop in one letting, the apportionments had to be settled with the district valuer. Then they had to settle with the tenant, or ask the county court to determine, the appropriate factor by which the gross value had to be multiplied having regard to the tenant's repair liabilities. And finally they had to agree with the tenant, or get a determination of the county court, on the reasonable charge for services.

As could have been expected, few landlords have elected to be responsible for internal decorative repairs. Most of them made rough estimates of the "appropriate factor" (usually erring on the side of the tenant in order to obtain quick agreement). But one important test case has been before the courts (*a*) and may shortly go before the House of Lords. In this case, where there was an exception for fair wear and tear, the county court took note of the repair work which the tenant would have had to do if negligent, and so reduced the factor to $1\frac{2}{3}$; this was upheld, with some reservations, in the Court of Appeal. It seems an extraordinary ruling, which in effect implies that the appropriate factor can only be 2, $1\frac{2}{3}$ or $1\frac{1}{3}$. Similarly, as regards services, most landlords have agreed figures readily with their tenants. *Regis Property Ltd.* v. *Dudley* referred to above gave a guide on the question of reasonable charge for services and, in particular, allowed the landlord to claim for profit on the cost and for depreciation of plant.

In the event, although the Act came into force on July 6, 1957, few rents were in fact raised before the beginning of 1958, and then only by 7s. 6d. per week.

Landlords were of course aware that these increases in rents could only be claimed if the premises were not in disrepair. If there are defects which ought reasonably to be remedied, the Act makes for many complications. Rather than come up against these complications landlords preferred to have their properties surveyed and to carry out any necessary repairs at once—which was all to the good. But some tenants found it necessary to serve what is known as "Form G," specifying defects; and here most of the landlords concerned seemed to have acted promptly, so that there have been relatively few cases where the local authority has had to serve a certificate of disrepair. It may be mentioned that in some areas

(*a*) *Regis Property Ltd.* v. *Dudley* [1958] 2 W.L.R. 356, noted *ante*, p. 236.

tenants were pressed by political agitators to serve Form G wholesale and at one time there were complaints against the Minister that he had not provided enough copies of the form. But it was all a storm in a teacup.

A fair summary of the position would seem to be, as the Minister of Housing himself contends, that the increase in rents of controlled lettings has been accepted with very little resentment and that the Act is working satisfactorily in ensuring that the houses are put and kept in reasonable state of repair.

Decontrolled Lettings

The position in regard to the 750,000 houses decontrolled because of their high rateable values has, however, been the crux.

In view of the standstill period, there was a strong inducement to both landlord and tenant to come to reasonable terms. The landlord could get an increase in rent immediately, whilst the tenant would be able to stay in his home with security of tenure. Approaches were therefore soon made from both sides, and some proposals made by important landlords were of special interest.

In one instance, the property comprises a series of large blocks of homogeneous flats. Hitherto rents had borne no relation to the accommodation or amenities provided; they were haphazard. The landlord has taken this opportunity to get the rents on to a systematic basis. He proposed two scales: one to sitting tenants, the other to prospective tenants and reflecting his estimate of the value in a free market. He offered sitting tenants a seven-year lease, with an optional break at five, with a variation clause regarding cost of services. If they accepted within two months, the new tenancies could apply as from August 1. If not, the tenants could either leave in October, 1958, or they would be offered a tenancy at the estimated free market rent. On broad average the increase over present rents was 30–40 per cent. for sitting tenants. In the result of 825 lettings, 675 tenants have accepted the offers, 78 may accept and 60 are still undecided; 12 have left voluntarily.

Another big company made a thorough investigation of the rents the tenants were likely to be ready to pay for their flats, and they also made estimates on a very conservative basis of the economic rent of replacements. They thereupon drew up schedules of the appropriate rent for each flat and offered three-year tenancies. Any substantial increase in rent would be spread over the period. The average increase in inclusive rent was about 66 per cent. above the 1939 figure. In the result, out of nearly 5,000 tenants, 4,800 have agreed new leases. The remaining 200 are not yet decided.

Other instances show that responsible landlords have rarely asked for a net rent exceeding 2½ times the gross value. But there are some allegations that stiff repairing liabilities have occasionally been imposed on the tenants.

A sample survey carried out by the Association of Land and Property Owners in March, 1958, gave the following results:

	Number	%
1. Total of decontrolled dwellings covered	20,828	100
2. Dwellings of which new leases have been offered	20,045	96
3. Dwellings of which new leases have not been offered	503	2½
4. Houses offered for sale	190	1½
5. Indeterminate	90	
6. New leases accepted or likely to be accepted to date	17,016	85
7. New leases refused or likely to be refused to date	1,211	6
8. Tenants likely to leave voluntarily before October 6, 1958	730	3½
9. Indeterminate, still negotiating, etc.	1,088	5½

In the above table item 3 (503 lettings) covers the total tenancies which are to be terminated on October 6 and where presumably action will, if necessary, be taken to evict. The reasons given are mainly that the tenants were constantly in arrear or otherwise unsatisfactory, but there were a few cases where the accommodation was wanted by the landlord or his agents.

The figures given under items 6 to 9 are somewhat less firm and there is a certain amount of overlap between them. For instance, some new leases have not been accepted because the tenant has found other accommodation. Several replies also stated that refusals to accept new leases were conditional and that this total was decreasing.

The terms on which new leases were offered could not be related to the number of dwellings affected. They were mainly for three, five or seven years, with the first figure predominating. The new rents varied: between 2 and 2½ times the gross value being the figure most frequently given. There were four instances were the multiplier was below 2 and one instance where it was 4. The average increase in gross rents (including services but excluding rates) varied widely. In a few cases no change was being made in rents on compassionate grounds; at the other extreme an increase of 150 per cent. was mentioned twice. Out of sixty-one averages or ranges mentioned an increase between 40 and 60 per cent. occurred in thirty-four instances. As the questionnaire did not inquire about the responsibility for repairs, the increase in rents could not be related to the number of dwellings affected. The increase was obviously related to the previous rent level, to the extent to which repairs increases were made under the Housing Repairs and Rents Act, 1954, and no doubt also to the sharing of responsibilities for repairs.

Although inquiries from tenants regarding cheaper accommodation were mentioned in several instances, only 470 firm applications for transfers to such accommodation were recorded. The landlords often declared themselves willing to meet tenants, sometimes by exchange of tenancies with other members of the Association. It was usual for sitting tenants to be offered better terms than new tenants would be expected to observe.

No useful information could be derived as to the number of vacancies after October 6. Most landlords stated that they had waiting lists for their flats and that they could relet any vacancies immediately.

The survey related mainly to London and obviously London and the large towns are the critical areas. The estimate that only 2½ per cent. of the tenants out of the total might have to face eviction was borne out by an inquiry made by London County Council with the Metropolitan Borough Councils—who now assess the possible number of evictions in London at 3,000. Birmingham Corporation give a figure of 750 for their area. Although it would not be easy to deal with these numbers, they do represent a problem of the magnitude far below that which has been conjured by the Labour Party.

Negotiations that were proceeding smoothly have been disturbed by the raising of two technical points. First, it was pointed out that the new lease to break the standstill period had strictly to be entered into " before the date specified " in a notice (Form S) to obtain possession. Thereby many landlords were induced to send out notices as a pure formality, and it aroused needless apprehensions. Next, the Minister, in dealing with an awkward question in the House of Commons, gave an opinion on retrospective leases which threw some doubt on the validity of many leases already agreed. But these technical matters were far less serious than the resolutions adopted by the Labour Party at their annual conference threatening to restore controls when they came into power and to review the whole arrangements for determining rents; and then to municipalise all rented homes.

During the period whilst negotiations have been going on, there has been much political pressure. The Labour Party brought in a series of weekly 10-minute rule motions and so kept up incessant agitation. (The tenderness shown by the Party for the feelings of the middle-class and higher income groups who are mainly affected is, to say the least, quite remarkable.) Again, Conservative back benchers have felt impelled to warn the Government against the fear of wholesale evictions at the end of the standstill period—*i.e.*, after October 6, 1958.

It is perhaps not very strange that so many anxieties have been expressed on behalf of pensioners, since they have notoriously been clinging to low-rented accommodation often too large for them. But landlords have in fact shown that they are ready to deal sympathetically with these cases.

Of course, there are some bad landlords and some landlords who are tired of the years of rent restrictions and would prefer to sell their property, with vacant possession.

The fears expressed about possible hardship cases led the Minister of Housing on February 22 to urge landlords who had not yet offered new tenancies to think again, whilst there was still ample

time for negotiation. "They ought to make offers at once, as it was not right to leave their tenants in uncertainty and anxiety. Those who did not heed his words might regret it." This warning was followed by the introduction of a Bill (*b*) to amend the law of landlord and tenant so as to give limited protection under certain conditions to tenants who are threatened with eviction on October 6 or thereabouts. This Bill has passed the Commons and is now in the Lords. There is no doubt that it gives adequate protection to the good tenant against a bad landlord; but there are some doubts as to whether it is altogether fair to the good landlord who has an awkward and troublesome tenant. But perhaps the gravest criticism against the Bill is that, in effect, it will allow many tenants who ought to move to stay on for a further period up to three years, so permitting continued under-occupation and preventing the landlord from carrying out conversions and improvements.

Conclusion

As already stated, the Rent Act, 1957, seems to be doing all that it was intended in regard to houses remaining controlled. There have been few complaints about rents and there is ample evidence that the houses in question are being better maintained. But it is still too early to see whether the provisions for decontrol are producing the desired results. The rents offered to sitting tenants in new leases are below those that are being asked for vacant premises and the number of the latter is insufficient to create a competitive market. So the proper level of free market rents is still to seek. It is true that some owners of vacant houses may be more ready to let them nowadays than to sell, or to let unfurnished premises instead of furnishing them, but there is as yet no overwhelming evidence that more and more accommodation is being made available for renting, except on long leases or at rather high rents.

(*b*) The Landlord and Tenant (Temporary Provisions) Bill.

LOSS OF THE DEPOSIT

By D. Macintyre, m.a., Barrister-at-Law

The duties of an auctioneer or estate agent in respect of a deposit which has been paid to him upon a sale of land seem reasonably clear. In the absence of any express provision to the contrary he holds the deposit as a stakeholder. If the contract is completed, it is his duty to pay it to the vendor; if no completed contract results, he must return it to the purchaser, unless, of course, the sale has gone off owing to the default of the purchaser and under the terms of the contract, express or implied, the deposit is to be forfeited to the vendor in that event (*a*). So much appears to be well settled. But what is the position if the deposit cannot be paid to either the vendor or the purchaser, because the stakeholder has become insolvent or has absconded with the deposit? The purpose of this article is to consider, as between vendor and purchaser, upon whom the loss of the deposit falls in such circumstances, (a) where the loss occurs after, and (b) where the loss occurs before, a binding contract of sale has been concluded.

If the deposit is lost after contract, there is authority for the view that the loss must be borne by the vendor. Sir William Grant M.R. said in *Fenton* v. *Browne* (*b*):

> "Upon a sale by auction the vendor determines who is to receive the deposit. The auctioneer is not a stakeholder of the purchaser: at least not of his choice. If he were a stakeholder for both parties, either would have a right to propose to change the stakeholder and the party refusing takes upon himself the risk."

In that case an agent of the vendor, to whom a deposit had been paid, absconded, and the representatives of the vendor were charged with the loss. But this case (in which the sale was in fact by private treaty) seems to have been decided on the ground that the vendor, having refused to concur in the purchaser's proposal that the deposit should be paid into court, on the ground that the deposit was safe in the hands of the agent, took upon himself the risk of the agent's credit.

(*a*) See, for example, *Harington* v. *Hoggart* (1830) 1 B. & Ad. 577; *Burrough* v. *Skinner* (1770) 5 Burr. 2638.

(*b*) (1807) 14 Ves. 144, 150.

Nevertheless in *Smith* v. *Jackson* (*c*) the responsibility of a vendor for a loss of a deposit occasioned by an auctioneer was taken by Sir Thomas Plumer V.-C. (citing the passage from the judgment of Sir William Grant M.R. set out above) to have been determined in *Fenton* v. *Browne* (*d*). The deposit in this case, however, was not lost. The question for decision was whether a purchaser at an auction, who had gone into possession at an occupation rent pending the settlement of a dispute about the vendor's title, should be allowed any deduction from the rent in respect of the deposit which he had already paid to the auctioneer: and the court, basing its decision mainly on the fact that the deposit had been expressly paid "in part of the purchase money" answered this question in the affirmative. The question whether an auctioneer is for this purpose the agent of the vendor or the purchaser or both was not discussed: but in the next case, *Annesley* v. *Muggridge* (*e*) the same learned judge said (*f*) (citing *Smith* v. *Jackson* (*g*)).

> "Pending the dispute as to the title all the risk respecting the deposit rests with the vendor: for though the auctioneer is, to a certain degree, stakeholder for vendor and vendee, yet, so far as respects any risk to the deposit, the auctioneer is considered as the agent only of the vendor."

But the decision was to the effect that the auctioneer, on paying the deposit into court, could deduct his costs and expenses. Here again the deposit was not in fact lost. But both these last two cases seem to have proceeded on the footing that a deposit paid to an auctioneer in accordance with the terms of a contract of sale may be treated for this purpose as money belonging to the vendor, even before completion: although, in the event of the contract not in fact being completed owing to the default of the vendor, it must, of course, be repaid to the purchaser.

The point arose again in *Rowe* v. *May* (*h*), where Sir John Romilly M.R. said in reference to a sale by auction (*i*):

> "When a purchaser pays a deposit on his purchase money to the auctioneer, upon whom does the loss fall? If the matter goes off, because the vendor cannot make a good title, it is the vendor's duty to repay the deposit and the loss occasioned by the non-completion: and in case an action were brought against him for breach of the contract, the amount of deposit not

(*c*) (1816) 1 Madd. 618, 620.
(*d*) *Supra.*
(*e*) (1816) 1 Madd. 593.
(*f*) At p. 596.
(*g*) *Supra.*
(*h*) (1854) 18 Beav. 613.
(*i*) At p. 616.

> repaid would be part of his loss and the purchaser would be entitled to add it to the damages: so, if the contract be completed and the deposit cannot be recovered from the auctioneer, who for this purpose is the agent of the vendor, it will be the vendor's loss and not that of the purchaser."

The auctioneer in this case was instructed by a mortgagor, but the sale was adopted by the defendant, who was a mortgagee with a power of sale. Subsequently the defendant, who had been authorised by the purchaser to receive the deposit from the auctioneer, was only able to obtain part of it, since the auctioneer had become insolvent: and he refused to complete the contract, unless the purchaser made good the loss. It was held, however, in this case that, as between the purchaser and the mortgagee, the mortgagee stood in the shoes of the vendor and must bear the loss.

It seems, therefore, that if a deposit is paid to an auctioneer or estate agent as stakeholder after contract and in accordance with the terms of a contract, the risk of the loss of the deposit, while it is in the hands of the stakeholder, must be borne by the vendor. The decision in *Rowe* v. *May* in particular seems to lend definite support to this view (*k*). The reasons appear to be that (1) the vendor chooses the person to whom the deposit is to be paid, and (2) the deposit is intended by both parties to form part of the purchase price of the property, which has become payable under the terms of the contract (*l*). It should also be noted that the purchaser is normally bound by his contract with the vendor to pay the deposit to the stakeholder.

But a deposit may also be paid to an estate agent, before any binding contract has been concluded. Upon the responsibility, as between vendor and purchaser, for the loss before contract of a deposit paid in these circumstances there seems to be no direct authority. The only reported decision which seems to throw any light at all on this problem is *Chillingworth* v. *Esche* (*m*). In that case there was an agreement to purchase a house "subject to a proper contract to be prepared by the vendor's solicitors": the purchaser acknowledged having paid (in this case to the vendor personally), the sum of £240 "as deposit and in part payment of the purchase money": and the vendor acknowledged having

(*k*) Page-Wood V.-C. observed in *Barrow* v. *White* (1862) 2 J. & H. at p. 587 that there can be no doubt since *Rowe* v. *May* (*supra*) that upon completion of a purchase purchasers must be allowed in account as between themselves and the vendor the entire amounts paid by them by way of deposit.

(*l*) It is also normally intended as a guarantee that the purchaser will complete the contract: see *Howe* v. *Smith* (1884) 27 Ch.D. 89, *Soper* v. *Arnold* (1889) 14 A.C. 429. But this seems to have little bearing on the present question.

(*m*) [1924] 1 Ch. 97.

received that sum. The Court of Appeal, having held that there was no binding contract, so that either party was at liberty to withdraw from the negotiations, also held that, since there never was a binding contract, the deposit was returnable, even though the vendor had tendered a proper contract and remained perfectly ready and willing to complete the sale and it was the prospective purchaser who withdrew. The payment of the deposit, it was held, was merely made in anticipation of a final contract. It was "an anticipatory payment intended only to fulfil the ordinary purpose of a deposit, if and when the contemplated agreement should be arrived at (*n*)." The purchaser, in the view of Warrington L.J. (*o*), had merely shown that he meant business. He had not bound himself, but in order to show a definite intention, he was willing to part with money, and run the risk of the vendor spending the money and being unable to return it if negotiations were broken off.

If that is the true nature of a deposit paid before contract, it seems at least arguable that the risk of the loss of a deposit, before a binding contract has been concluded, must be borne by the potential purchaser. After contract there would appear to be no valid distinction in principle between a deposit which remains in the hands of an estate agent, having been paid to him before contract, and a deposit which is not paid to an auctioneer until there is already in existence a binding contract of sale. From the moment of contract the risk of loss of the deposit would appear to fall upon the vendor, since from that moment onwards any deposit paid fulfils the ordinary purpose of a deposit. It is submitted, however, that until the moment arrives, quite different considerations apply. A deposit paid before contract is not, in the absence of any special stipulation to the contrary, a guarantee that the potential purchaser will not break off the negotiations (*p*). Nor is it a part payment of the purchase price, since, until there is a contract of sale, no purchase price is payable. Nor is the potential purchaser contractually bound to pay the deposit to a stakeholder of the vendor's choice or, indeed, at all. A deposit cannot, it is submitted, be treated as belonging in any sense to the vendor before there is a contract of sale. It would seem, therefore, that in cases where the negotiations break down before contract the loss of any deposit which may have been paid will fall upon the intending purchaser.

But the negotiations may not break down before contract. It may happen that a deposit is in fact lost, and can ultimately be proved to have been lost, before contract, although the loss is not

(*n*) *Per* Sargant L.J. at p. 115. See also judgment of Warrington L.J. at p. 112.
(*o*) [1924] 1 Ch. at p. 112.
(*p*) This point was decided in *Chillingworth* v. *Esche* (*supra*). See especially the judgment of Pollock M.R. at p. 108.

discovered by either party till after written contracts have been signed and exchanged. Upon the position with regard to the deposit in this third intermediate case there seems to be no authority whatever. It is submitted, however, that when once a binding contract has been concluded, the answer to the problem depends upon the terms of that contract, express or implied. This is certainly the position in the normal case where a deposit is paid on the signing of the contract (*q*): and there seems to be no reason why the same principle should not apply to a deposit paid before contract. If, for example, a contract expressly provides that the deposit shall be held by an agent at the risk of the purchaser, then the purchaser must, it seems, expressly agree to run the risk of any loss of the deposit, whether that loss occurs before or after contract (*r*). If, on the other hand, a contract contains a clause to the effect that the amount of the deposit has been paid to an estate agent (or other person) as stakeholder, then it seems that the vendor must be agreeing as part of the bargain to accept the payment made to the agent before contract (which was, after all, intended to fulfil the functions of a deposit in the event of a contract), as a part payment of the purchase money due under the contract, and to rely on his rights against the stakeholder so far as the amount of the deposit is concerned. No condition (in the absence of an express condition) would appear to be imposed that the agent still in fact holds the deposit at the date of the contract (*s*). Nor, it seems, is any representation made by either party to that effect, which would give rise to an estoppel against the other. Both parties no doubt assume that the deposit is in the hands of the agent at the date of the contract, if only because neither of them has any reason to suspect the contrary. The vendor would also appear to admit the fact that the amount of the deposit has been paid to the agent, which is, of course, true. It is submitted, however, that the vendor neither admits nor represents to the purchaser by words or conduct anything more than that: but that the vendor must still bear any loss of the deposit, whenever that loss may occur, not because an estoppel has arisen against him, but because he has undertaken by the terms of his contract to convey the property to the purchaser on payment of the balance of the purchase price (*t*).

(*q*) *Howe* v. *Smith* (1884) 27 Ch.D. 89; *Palmer* v. *Temple* (1839) 9 A. & E. 508.

(*r*) An express provision of this nature setting out the bargain between the parties on this point would, of course, remove the difficulty and may well be thought desirable.

(*s*) But an express condition of this nature would, no doubt, be enforced.

(*t*) If this view is right, it seems to follow that damages for breach of contract would include the amount of the deposit, even though the purchaser might not be entitled to any damages for loss of his bargain under the rule in *Bain* v. *Fothergill* (1874) L.R. 7 H.L. 158.

It seems, therefore, although the matter is by no means free from doubt, that the position as between vendor and purchaser with regard to the loss of a deposit held by an auctioneer or estate agent depends primarily on whether there is or is not a binding contract of sale. If there is no contract, it seems that the loss will be borne by the potential purchaser in any event but when once a binding contract has been concluded, any loss of the deposit, it seems, must be borne by the vendor, unless the contract expressly provides that the deposit is to be at the purchaser's risk until completion. Vendors, it is suggested, should do their best to ensure that an express stipulation of this nature does appear. Purchasers should perhaps endeavour to refrain from paying a deposit before contract in any event.

It has been assumed, of course, that the payment of the deposit to the auctioneer or estate agent was made to him in the capacity of stakeholder. If he received the deposit with the authority of the vendor as the vendor's agent, then payment to the auctioneer or estate agent will be treated as payment to the vendor and the vendor will always be responsible for any loss. But payment to auctioneers at least will be deemed to be payment to a stakeholder, unless a contrary intention appears (*u*).

(*u*) See, for example, *Edgell* v. *Day* (1865) L.R. 1 C.P. at p. 84.

COMPENSATION FOR UNFIT HOUSES

By Asta C. Davies, ll.b., Barrister-at-Law

The Housing Act, 1957, contains four main types of compensation which may become payable by a local authority when a dwelling-house is the subject of a demolition or closing order made by the local authority or when it is comprised in a declared clearance area under the provisions relating to slum clearance. Certain of these payments lie entirely within the discretion of the local authority and the local authority are given power, should they decide to exercise their discretion, to make such payments having regard to the matters which the Act wishes them to take into consideration; other payments are obligatory—the local authority has no discretion whether the payment shall be made or as to the amount of such payment.

It is not the purpose of this article to discuss compensation arising from the purchase by the local authority of unfit property, either by agreement or by compulsory purchase, but to discuss and compare generally compensation to tenants and certain owner-occupiers who nevertheless remain as owners of the site after demolition or clearance. The classes of compensation are as follows:

1. Well-maintained payments arising under sections 30 and 60 of the Housing Act, 1957, as they relate to: (i) houses comprised in demolition or closing orders (s. 30); (ii) houses comprised in clearance areas (s. 60).
2. Payments to owner-occupiers of dwelling-houses as set out in the Second Schedule to the Housing Act, 1957.
3. Payments to owner-occupiers of dwelling-houses used for business purposes similarly set out in the Second Schedule to the Act.
4. Discretionary payments (a) to tenants of dwelling-houses used for business purposes, as provided for in section 63 of the Housing Act, 1957, and (b) towards removal expenses.

There does not appear to be any difference in the provisions for compensation under the last three headings in their relationship to properties comprised in demolition orders, closing orders and clearance areas so that under these headings references to houses include unfit houses regardless of the manner in which they have

been dealt by the local authority, but the reader will observe material differences in the relation of well-maintained payments to houses comprised in demolition or closing orders and those comprised in clearance areas which will now be discussed under the appropriate headings.

1. "Well-maintained" Payments

On a first reading it may seem a little strange to find that houses condemned as unfit may nevertheless attract a payment more usually referred to as a "well-maintained" payment and indeed it is somewhat difficult to decide what constitutes a "well-maintained" house. Local authorities must make these payments where the statutory conditions are complied with and there is no discretion as to amounts—the basis for calculation is set out in Part I of the Second Schedule to the Housing Act, 1957, and is referable to rateable values as follows:

EITHER (a) Nine times the rateable value of the house at the date of the making of the order if the house has been owner-occupied for three years prior to that date; if not so occupied the payment is to be four and one-half times the rateable value (The Housing (Payments for Well-maintained Houses) Order, 1956, S.I. 1956, No. 1710)

OR (b) The amount by which the maintenance expenditure for the five years preceding the date of the order exceeds one and a quarter times the rateable value,

whichever sum calculated under (a) or (b) is the greater. There is, however, a provision which provides that any sum so calculated shall not exceed the difference between the full value and the site value.

(i) *In relation to demolition or closing orders*

Under section 30 of the Act any person may represent to the local authority that a house which is the subject of a demolition or closing order "has been well-maintained and that the good maintenance of the house is attributable wholly or partly to work carried out by him or at his expense." This representation must be made within three months from the service of the order. If the house is vacated in pursuance of the order and the local authority are satisfied that the representation is correct, they must make a payment authorised by Part I of the Second Schedule to the Act.

A " well-maintained " house is not defined in the Act but, looking closely at the provisions of section 30, we find that the emphasis in that section is on repair where it is provided that the local authority should, when considering the correctness of the representation, leave out of account " any defects in the house in respect of any such matters as are mentioned in paragraphs (*b*) to (*h*) of subsection (1) of section 4 of this Act." This means that in ascertaining the correctness of the representation the local authority is to disregard defects in the condition of the house in respect of stability, freedom from damp, natural lighting, ventilation, water supply, drainage and sanitary conveniences, and facilities for the storage, preparation and cooking of food and for the disposal of waste water. These are seven of the eight matters which in the first instance the local authority has to take into account when deciding whether a house is unfit for human habitation. The one matter which is left is " repair " and it is submitted that the local authority is merely to consider the state of repair and nothing else. But does this solve the difficulty in interpreting the phrase " well-maintained "? For how can one differentiate between " repair " and items such as " stability " and " freedom from damp " which may be component parts of " repairs "?

If the local authority are not satisfied that the representation is correct they must serve notice of this on the person making the representation and an appeal to the county court lies at the instance of a person aggrieved by such notice.

According to section 30 any person may make the representation and it is to this person, and to this person only, that a payment can be made. There is no provision for an apportionment of compensation.

It is submitted, however, that section 30 lets in the weekly tenant insofar as " any person " may make the representation although in the notes to Form 7 prescribing the form of demolition order contained in the Housing (Prescribed Forms) Regulations, 1957, the note reads: " If a person interested in the house to which this order applies thinks that notwithstanding its unfitness the house has been well maintained by him or at his expense, he may within three months after the service of a copy of the order on persons interested make a representation to the local authority accordingly." The only persons on whom a copy of the order is served are " the person having control of the house," " any other person who is an owner thereof " and ascertainable mortgagees (ss. 16 and 17 of the Act). According to this note, therefore, " persons interested " appear to be confined to the persons just mentioned, excluding weekly tenants. Section 30 of the Act says

that " any person " may make a representation and clearly this would include a tenant. The note to the form in the Regulations does go on to ask the person on whom a copy of the notice is served to bring these provisions to the notice of the tenant, but bearing in mind that a representation must be made within three months of the service of the order it may well be that this period has expired and the tenant's right lost before he becomes aware that he has a right at all. Clearly in a number of cases, weekly tenants contribute towards the good maintenance of a house but the Act does not provide in section 30 for these provisions to be brought directly to their notice.

(ii) *In relation to houses comprised in clearance areas*

Section 60 of the Act, which relates well-maintained payments for houses comprised in clearance areas, does not even go as far as section 30 in indicating what constitutes a well-maintained house, but it is submitted that the Minister of Housing and Local Government, who in these cases is to be satisfied that the house has been well-maintained, must be bound to some extent by the provisions contained in section 30 and that similarly the emphasis will be on repair.

With regard to the making of the payment we find that section 60 is more explicit insofar as it provides that the payment shall be made to the owner if the house is owner-occupied, or if not so occupied " to the person or persons liable under any enactment, covenant or agreement to maintain and repair the house, and if more than one person is so liable, in such shares as the authority think equitable in the circumstances." This would enable, for instance, a lessee to claim the whole or part of a well-maintained payment. There is a proviso to the section that " if any other person satisfies the local authority that the good maintenance of the house is attributable to a material extent to work carried out by him or at his expense, the local authority may, if it appears to them to be equitable in the circumstances, make the payment, in whole or in part, to him." This lets in the weekly tenant and, provided he can so satisfy the local authority, he can claim the payment.

It would appear that there is no time limit for the making of a representation of good maintenance under this section, and although there are no provisions which compel a local authority to bring these matters to the notice of any tenant who may be affected, he may seek a payment whenever he hears of his right, assuming, of course, that the property is still standing so that an inspection can be made.

(iii) *Summary*

It will be seen that there are differences in the application of well-maintained payments to houses which are subject to demolition orders and houses comprised in clearance orders, and it is convenient to interpose a brief summary showing those differences:

Demolition and Closing Orders	Clearance Orders
1. Representation of good maintenance to be made within three months of service of demolition or closing order.	No time limit within which representation has to be made.
2. Payment to be made to person who made representation.	Payment to be made either to owner-occupier or to other person liable for repairs unless local authority is satisfied that any other person is entitled to it.
3. Local authority has to be satisfied that the condition of the house warrants a payment.	The Minister of Housing and Local Government has to be so satisfied.
4. No provision for apportionment but presumably there can be a joint representation.	Local authority can decide to apportion.
5. Notice to the effect that no payment falls to be made must be served.	No similar provision.
6. Provision for appeal to county court by person aggrieved by the decision that no payment falls to be made.	No appeal.

(iv) *Cases where double payments may arise*

Cases where double payments may arise, namely, a well-maintained payment and an owner-occupier payment, are referred to below under heading 2 (iv).

2. Payments to Owner-occupiers of Dwelling-houses

The Housing Act, 1957, contains limited provisions enabling owner-occupiers of property included in demolition, closing and clearance orders to obtain compensation in respect of their interest in that property provided that certain conditions are complied with. These compensatory provisions are temporary in so far as they will not be applicable to houses vacated after December 13, 1965. They are contained in the Second Schedule to the Act.

(i) *Qualifying factors*

The conditions which must be complied with in order that the owner's interest in the property can be compensated are briefly (a) that his interest was purchased between September 1, 1939, and whichever is the earlier of the following dates: December 13, 1955, or the date of declaration of the clearance area in which the property is situate, or the date when the demolition or closing order was made; and also (b) that the person who acquired the interest between those dates, or a member of his family (defined as " the husband or wife, the children over eighteen years of age and the parents of that person "), occupied the premises or part thereof as a private dwelling on December 13, 1955.

A person who can comply with these conditions need not, however, be in occupation when the premises are vacated and this does not prevent him from qualifying for compensation provided his *interest* is still held when the premises are vacated. Paragraph 4 of the Second Schedule to the Act provides that:

> " this paragraph shall have effect where at any time before the 13th day of December, 1965, a house . . . has been vacated in pursuance of. . . ."

but it does not insist that it must necessarily be vacated by the person entitled to the interest on December 13, 1955.

(ii) *Property subject to mortgage*

It would appear from the wording of the Schedule that the compensation is payable by the local authority when the premises are vacated, and if at that time the interest to be compensated is subject to a mortgage or similar charge, either party to the mortgage can apply to the county court for an order modifying or discharging the terms of the mortgage as the court may think equitable having regard particularly to whether the mortgagee acted reasonably in advancing the principal sum, and also to the extent to which the mortgagor's default in carrying out repairing covenants in the mortgage has contributed to the unfit condition

of the house. The mortgagee will be deemed to have acted unreasonably if, when the mortgage was created, he knew or ought to have known that the mortgage was not sufficient security for the principal sum advanced.

If the house is in the process of purchase by way of an agreement to purchase by instalments the court is empowered to consider whether the amount already paid as principal represents an adequate price for the purchase. These provisions appear to provide an adequate protection to purchasers or tenant-purchasers of property which has a shortened life. In other words the county court has a statutory right to look at the bargain made and amend the terms of it if the court considers that one party or both have in the circumstances acted unreasonably in making the bargain.

(iii) *Assessment of compensation*

What type of compensation do these owner-occupiers get? Paragraph 4 (4) of the Second Schedule provides:

> "The amount of any payment made under this paragraph in respect of an interest shall be an amount equal to its full compulsory purchase value less the compensation which was or would have been payable in respect of the interest in connection with the compulsory purchase of the house at site value."

The key phrase is "full compulsory purchase value" which is defined in paragraph 7 (2) of the Second Schedule as

> "the compensation payable in respect of the compulsory purchase of that interest if that compensation fell to be assessed in accordance with subsections (1) and (4) of section 59 of this Act, and paragraph 2 of Part III of the Third Schedule to this Act had not been passed, and, in the case of a house subject to a clearance order, demolition order or closing order, if the making of that order were a service of the notice to treat."

According to section 59 the position is briefly that the compensation is to be assessed in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919 (as amended), without taking into consideration the cost of putting the house into a sanitary condition or reasonably good repair, so that very generally and in layman's language as opposed to that of a land valuer, the compensation will be the market value of the house less site value and disregarding the cost of putting the premises into a sanitary condition. But that is not all—the 1919 Act contains a further element of compensation, namely "compensation for disturbance or any other matter not directly based on the value of the land."

It is this element of compensation which was considered in *Harvey* v. *Crawley Development Corporation* (*a*) in the course of which Denning L.J. observed:

> " the principles of compensation have been gradually developed over the years in cases decided on the Lands Clauses Consolidation Act, 1845, but specific rules are now stated in section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919. Under those Acts the law is settled, both in this country and in Scotland, by two cases. The Scottish case in *Venables* v. *Department of Agriculture for Scotland* (*b*) and the English case is *Horn* v. *Sunderland Corporation* (*c*) in this court. These cases show that, in addition to the actual market value of the house, when sold with vacant possession, Mrs. Harvey is entitled to ' compensation for disturbance ' which is specifically preserved by section 2, rule (6), of the Act of 1919, and includes all damage directly consequent on the taking of the house under statutory powers."

Instances of the matters considered to be direct consequences of compulsory acquisition and therefore for which compensation can be recovered under the head of "compensation for disturbance" are stated by Denning L.J. in the course of his judgment thus:

> " Mrs. Harvey gets compensation for having to move out her furniture and put it into the new house: she gets compensation for having to alter the curtains and carpets and remake them to fit the new windows and floors. Take business premises where fixtures and fittings have to be moved; or there is loss of business through being turned out; or loss of goodwill. All that loss and expense is the proper subject of ' compensation for disturbance ' in addition to the open market value of the land."

And *per* Romer L.J.:

> " The authorities to which our attention was drawn do establish that any loss sustained by a dispossessed owner (at all events one who occupies his house) which flows from a compulsory acquisition may properly be regarded as the subject for compensation for disturbance, provided, first, that it is not too remote, and secondly, that it is the natural and reasonable consequence of the dispossession of the owner."

This then is what is reflected in the payment equal to the " full compulsory purchase value " in respect of the interest held in property by an owner-occupier who becomes entitled to a payment

(*a*) [1957] 1 Q.B. 485.
(*b*) 1932 S.C. 573.
(*c*) [1941] 2 K.B. 26.

under the Second Schedule to the Housing Act, 1957, and we will see later that it lies within the power of a local authority to alleviate hardship which equally may be caused to tenants in the upheaval of their domestic circumstances occasioned by slum clearance programmes.

The payments to owner-occupiers of unfit houses will come to an end after December 13, 1965, and unfit houses vacated after that date will not attract a payment under these provisions.

(iv) *Double payments*

The Act provides that well-maintained payments are not to be made to any person in respect of a house where that person's interest in the property attracts an owner-occupier payment under Part II of the Second Schedule to the Housing Act, 1957 (para. 2 (2) of Part 1 of the Second Schedule).

At first sight it may be thought that this means that a well-maintained payment can never be made when an owner-occupier payment is attracted but it is possible that both payments must be made in certain peculiar circumstances which arise in cases where the person qualifying for an owner-occupier payment is not the person in occupation of the house at the date when it is vacated in pursuance of the order. It is possible for him to be entitled to an owner-occupier payment under Part II of the Second Schedule to the Housing Act and the tenant or other occupier at the date of vacation may, if the condition of the premises so warrant and he is able to satisfy the local authority under the proviso to section 60 or if he himself makes the representation under section 30, be entitled to a well-maintained payment.

3. Payments to Owner-occupiers of Dwelling-houses used for Business Purposes

Although payments to owner-occupiers under heading 2 above will come to an end in 1965, there appears to be no similar limitation imposed in respect of payments to owner-occupiers of businesses carried out in unfit dwelling-houses, compensation for which is set out in paragraph 6 of the Second Schedule to the Housing Act, 1957. This paragraph provides for a payment to be made where, after December 13, 1955, a house used in part for business purposes has been vacated in pursuance of a demolition or clearance order.

(i) *Qualifying factors*

(a) That at the date of the making of the order the house was occupied wholly or partly for business purposes, (b) that the

person entitled to the receipts of the business held an interest in the house (" interest " not including a tenancy of less than a year or a statutory tenant) and (c) that, on *either* December 13, 1955, or for ten years preceding the date of the order *some* person held an interest in the house and was entitled to the receipts of the business carried on therein.

(ii) *Assessment of compensation*

Although paragraph 6 is somewhat difficult to construe it would appear that the local authority are to make to a person holding an interest in the house at the date of the making of the order a payment in respect of that interest, and generally speaking the amount of that payment is to be calculated in the same way as payments made under heading 2 above, namely, " the full compulsory purchase value of the interest less the compensation which . . . would have been payable in respect of the interest in connection with the compulsory purchase of the house at site value." This amount is, however, to be reduced " by so much, if any, of that amount as may reasonably be attributed to any part of the house not occupied at the date of the making of the order for the purpose of the business." In addition, the words of Denning L.J. previously referred to when discussing compensation for disturbance as an integral part of " full compulsory purchase value " should be borne in mind as being likewise applicable to business premises.

4. Discretionary Payments

It has been shown that " compensation for disturbance " will be paid as of right to those persons entitled under Part II of the Second Schedule. But what of those persons displaced from slum and unfit properties who do not qualify for these payments but who nevertheless may suffer equal hardships? In the main these persons will be weekly or statutory tenants and they have to look for compensation in the discretionary payments which the local authority is empowered to make by sections 32 and 63 of the Housing Act, 1957, relating to premises comprised in demolition or closing orders and clearance orders respectively.

(i) *Payments to business occupiers*

The local authority has discretion which, if exercised, will fill the gap left by the mandatory provisions of the Second Schedule which do not cover tenancies for less than a year or tenancies of lock-up shops. This discretion is to pay to any persons so displaced

from a house or other building and who is carrying on any trade or business therein " such reasonable allowance as they think fit towards the loss which, in their opinion, he will sustain by reason of the disturbance of his trade or business consequent on his having to quit the house or buildings, and in estimating that loss they shall have regard to the period for which the premises occupied by him might reasonably have been expected to be available for the purpose of his trade or business and the availability of other premises suitable for that purpose."

In Circular 43/56 local authorities were asked by the Minister of Housing and Local Government to bear in mind, when considering the making of discretionary payments to tenants of business premises, the scale of payments laid down in the Second Schedule to the Act so that these short-term tenancies might be equated in treatment with owner-occupied business premises.

(ii) *Removal expenses*

The local authority is empowered to pay to a person displaced from a house or other buildings " such reasonable allowance as they think fit towards his expenses in removing." It has been shown that removal expenses are included in " compensation for disturbance " which will be paid to an owner-occupier qualifying for a payment under the Second Schedule to the Act. In other words, in the latter case the local authority has no discretion in the matter and an owner-occupier will receive a payment, an ingredient of which will probably be an amount for removal expenses. Bearing in mind that this type of expense is not necessarily attached to ownership of property but that a tenant may be equally as hard hit and incurs the same type of expense, it does appear to be anomalous that in one case the local authority is statutorily bound to pay for removal expenses if proved to be part of " disturbance " and in the other case can exercise a discretion and not make a payment at all. Indeed it may be that if these factors were put before local authorities it would have a positive effect on their policy regarding the question of removal expenses.

JOINDER OF DOCUMENTS TO FORM A MEMORANDUM

By G. H. L. Fridman, m.a., b.c.l., ll.m., Barrister-at-Law

The repeal of most of what were originally the provisions of the Statute of Frauds by the Law Reform (Enforcement of Contracts) Act, 1954, left untouched section 40 of the Law of Property Act, 1925 (as well as the law relating to contracts of guarantee). It is therefore still necessary for a contract which disposes of any interest in land, or a contract of guarantee, to be evidenced by a memorandum which contains a sufficient description of the parties to the contract, its essential terms, the price, and the signature of the party to be charged. In the ordinary case it will be easy to see whether such a memorandum exists and can be relied on by the plaintiff, who may be suing for damages for breach of contract or specific performance; for in the majority of cases the plaintiff will be relying on one document. But there is a large number of decisions from the early nineteenth century down to last year (when the Court of Appeal decided *Timmins* v. *Moreland Street Property Co., Ltd.* (*a*)) which deal with the difficulty that comes when the plaintiff is attempting to rely on *two* or more documents which *together* are alleged to constitute the required memorandum, in that the terms of the contract, or the names of the parties, are in one document and the signature of the defendant is on the other.

The history of this development in the law begins with the famous case of *Boydell* v. *Drummond* (*b*). There the two documents which the plaintiff, the publisher of a series of prints of scenes from Shakespeare's plays, sought to add together for the purposes of the Statute of Frauds were (a) the prospectus the plaintiff had issued, containing in it the terms under which the prints were to be produced and sold, and (b) a book entitled "Shakespeare Subscribers, their signatures," in which the defendant had signed his name. It was held that the two documents could not be joined for the purpose of the Statute because the signature (and the book in which it was written) did not refer to the prospectus. The defendant's signature could not be shown to refer to "the engagement contained in the particular prospectus without parol evidence which the statute excludes." So said Lord

(*a*) [1958] Ch. 110; [1957] 3 W.L.R. 678; [1957] 3 All E.R. 265.
(*b*) (1809) 11 East 142.

Ellenborough. The problem of what may be called "sufficient reference" has worried the courts ever since in a number of cases, producing different results.

Thus, in *Peirce* v. *Corf* (*c*), the plaintiff gave the defendant a mare to sell by auction. The defendant circulated a printed catalogue of the horses to be sold and in that catalogue the plaintiff's horse was described as Lot 49. The same description was given of the horse in the defendant's sales ledger. But neither the catalogue nor the conditions of sale were annexed to the sales ledger nor were they referred to in it. The mare was knocked down to X for £33: and the defendant's clerk wrote in the columns of the sales ledger, left blank for such purpose, the name of the purchaser and the price. Later X refused to take the horse. It was held that neither the catalogue nor the conditions of sale were sufficiently connected with the entry in the sales ledger, therefore there was no memorandum, so X was not bound to take the horse. That meant that the defendant had been negligent in the performance of his duty as the agent of the plaintiff, to whom, in consequence, he was liable. Both Quain and Archibald JJ. made it clear why there was no memorandum here. The former said: ". . . on the document itself there must be some reference from the one to the other, leaving nothing to be supplied by parol evidence except the identity, as it were, of the document." And Archibald J. stated that there must be "a contract in writing on different papers and referring to each other in such a manner as to show they are parts of the same contract." With this case can be compared *Rishton* v. *Whatmore* (*d*), in which, again, the sales book contained all the relevant parts of the contract made by the auction, *except* a reference to the conditions of sale: there was no memorandum. It will be seen, therefore, that joinder was beginning to be allowed, but only in exceptional cases.

But there follows a period in which, it would seem, the stringent requirements of these earlier cases were relaxed. The case which begins this later development is one which has been strongly relied on since as supporting different views—*Long* v. *Millar* (*e*). The defendant, an estate agent, contracted to sell land to the plaintiff, who paid a deposit. The defendant gave him a receipt for this deposit and in the receipt he referred to the land which was sold. The plaintiff signed an agreement containing the terms of the purchase. Then the owner of the land refused to

(*c*) (1874) L.R. 9 Q.B. 210.
(*d*) (1878) 8 Ch.D. 467.
(*e*) (1879) 4 C.P.D. 450.

complete, whereupon the plaintiff sued the defendant for breach of contract. It was held that the receipt and the agreement *together* constituted the memorandum, to which the defendant's signature was affixed; therefore he was liable. Baggallay L.J. put the law thus: "The true principle is that there must exist a writing to which the document signed by the party to be charged can refer, but that this writing may be identified by verbal evidence" (*f*). That was the principle, and in the case before the court, by the words "purchase of three plots of land," the receipt sufficiently referred to the document signed by the plaintiff. But Bramwell L.J. considered that the test was whether the two documents when placed side by side identified each other, a test which the two documents in question satisfied (*g*).

Clearly this was "a more liberal principle," as Jenkins L.J. termed it in the *Timmins* case (*h*). It was described as the "side by side" argument by Lopes L.J. in *Sheers* v. *Thimbleby* (*i*). In that case the defendant wrote to the plaintiff guaranteeing certain investments, and then in a later letter acknowledged the receipt of sums of money. The plaintiff advanced this money to X through the defendant and then sued the defendant on his guarantee. It was held that the various letters from the defendant could be joined so as to form a memorandum on which the defendant could be sued. As Lopes L.J. said, it would be "sheer affectation" not to conclude that the letters formed one and the same document but were separate and distinct. That same year, in *Pearce* v. *Gardner* (*j*), a letter and the envelope which contained it were joined and read together so as to identify the parties. If the letters in *Sheers* v. *Thimbleby* could be joined together, then clearly there was an inferential reference in the letter to the envelope in which it came.

The extent to which this approach of Bramwell L.J. was taken can be seen in the decision of Kekewich J. in *Oliver* v. *Hunting* (*jj*). H. sold O. a freehold estate and signed a memorandum which contained all the essential terms of the contract except a reference which would identify the property sold. O. later sent a cheque to H. as a deposit: H. replied by a letter acknowledging receipt of the cheque on account of the X estate (giving the name of it). In an action for specific performance of the contract, it was held that the letter from H. and the memorandum could be read together for the purpose of the Statute. Kekewich J., after quoting

(*f*) *Ibid.*, at p. 455.
(*g*) *Ibid.*, at p. 484.
(*h*) [1958] Ch. 110, at p. 125.
(*i*) (1897) 76 L.T. 709, at p. 711.
(*j*) [1897] 1 Q.B. 688.
(*jj*) (1890) 44 Ch.D. 205.

from Bramwell L.J. in *Long* v. *Millar*, said: "You are entitled to rely upon a written document which requires explanation" and "*wherever* parol evidence is required to connect two written documents together then that parol evidence is admissible" (italics supplied). Now these two statements, if compared with the language of Baggallay L.J. quoted above, can be seen to be a considerable extension of the principle expounded in *Long* v. *Millar*. It is not surprising, therefore, that Jenkins L.J. thought that the remarks of Kekewich J. were too wide: see the *Timmins* case (*k*).

The principle of *Long* v. *Millar*, in its original, more restricted form, not in the way which Kekewich J. extended it in 1890, nor in the way it was applied in *Sheers* v. *Thimbleby*, was reaffirmed by Russell J. in *Stokes* v. *Whicher* (*l*). There a carbon copy of an agreement had been signed by the defendant, while the top copy had been signed by the plaintiff, who now sued for specific performance. In holding that specific performance was available, Russell J., although urged to do so, did not have to apply the "side by side" principle of Bramwell L.J. in *Long* v. *Millar*, since it was obvious that a carbon copy referred to a top copy; nor did he have to accept the even broader principle laid down by Kekewich J., which may be called the "explanation demanding" principle. In what have now become famous words, Russell J. summed up *Long* v. *Millar* in this way: "if you can spell out of the document a reference in it to some other transaction, you are at liberty to give evidence as to what that other transaction is, and if that other transaction contains all the terms in writing, then you get a sufficient memorandum within the Statute by reading the two together."

It was this principle which was approved and applied by the Court of Appeal in *Fowler* v. *Bratt* (*m*). But it was the formulation of the principle adopted by Lopes L.J. in *Sheers* v. *Thimbleby* which seems to have been followed by Harman J. in *Burgess* v. *Cox* (*n*), although the learned judge also refused to adopt the "side by side" agreement. There, a later letter from the defendant referred to the purchase in question if not to the document relating to that purchase: therefore it could be incorporated so as to give the defendant's signature to the memorandum, and the defendant was liable for failing to complete the purchase. Thus, although there was no such physical relationship as existed between the receipt and the agreement in *Long* v. *Millar*, or between the letter

(*k*) [1958] Ch. 110, at p. 130.
(*l*) [1920] 1 Ch. 411.
(*m*) [1950] 2 K.B. 96.
(*n*) [1951] Ch. 383.

and envelope as in *Pearce* v. *Gardner*, yet in *Burgess* v. *Cox* it would have been "sheer affectation" (to quote Lopes L.J. again) to have refused to conclude that the letter and the document were not one and the same. It looks as if, in this case, the broader principle was applied, although it was apparently rejected, and although it was said that there was nothing in *Long* v. *Millar* or *Oliver* v. *Hunting* which would support the extension contained in the "side by side" argument, an opinion with which the present writer respectfully disagrees.

That was the state of the law when the *Timmins* case came before the Court of Appeal last year. Was there a broad principle of joining documents physically related and obviously meant to be one, as could be seen when they were placed side by side; or was it possible to join documents only when, if placed apart and not looked at together, there was an express or implied reference from one to the other?

In the *Timmins* case the plaintiff, who was trustee of a will, agreed to sell land belonging to the estate to the defendant, for whom X acted as agent. X gave a cheque to the plaintiff for the deposit, but the cheque was not drawn in favour of the plaintiff; it was drawn in favour of the solicitors for whom the plaintiff worked, who were also the solicitors employed by the plaintiff as trustee of the will. The plaintiff gave X a receipt which stated that the money was a deposit for the purchase of the property, which was named. When sued for failure to complete the contract, which caused loss to the plaintiff, *i.e.*, the trustee, the defendant pleaded section 40 of the Law of Property Act. It was held, *inter alia*, that the action would not lie because there was no memorandum. The cheque contained no reference to any other document or transaction except an order for payment which the cheque itself constituted and which was *not* an order for payment to the plaintiff. Therefore the cheque could not be read with the receipt so as to constitute a memorandum. Jenkins L.J. expressed the law applicable thus:

> "I think it is still indispensably necessary, in order to justify the reading of documents together for this purpose, that there should be a document signed by the party to be charged which, while not containing in itself all the necessary ingredients of the required memorandum, does contain some reference, express or implied, to some other document or transaction. Where any such reference can be spelt out of a document so signed, then parol evidence may be given to identify the other document referred to or, as the case may

> be, to explain the other transaction and to identify any document relating to it. If by this process a document is brought to light which contains in writing all the terms of the bargain so far as not contained in the document signed by the party to be charged, then the two documents can be read together so as to constitute a written memorandum for the purposes of section 40 of the Law of Property Act" (*o*).

In the case before the court this could not be done because the only document signed by the defendant was a cheque ordering the defendant's bankers to pay money to a firm of solicitors. It was "quite impossible to spell out of this cheque any reference, express or implied, to any other document or to any transaction other than the order to pay a sum of money constituted by the cheque itself"; and it was clear that "the mere fact that the payment must have been made for some purpose or for some consideration cannot reasonably be held to amount to a reference to some other document or transaction within the principle I have stated": *ibid.*

It will be seen, therefore, that Jenkins L.J., rejecting the approaches of Bramwell L.J., Lopes L.J. and Kekewich J. discussed above, came down firmly in favour of the narrower principle in *Long* v. *Millar* expounded by Baggallay L.J. But in the *Timmins* case, Romer L.J. dealt with the problem in terms of *both* approaches. He agreed with Jenkins L.J. as to an express or implied reference in the cheque, though he went on to say: "Had the plaintiff been the payee under the cheque, the position might have been different, though it is not necessary to decide that point" (*p*).

Then he made the point that the fact that the document was a cheque was insufficient, and uttered a warning against adopting "an unwarranted and possibly dangerous addition to the many judicial glosses which have already been put on the legislation": *ibid.* That seems to indicate that he viewed the "side by side" agreement with disfavour. But, the learned Lord Justice did continue by seeing what the result would be if the court were to adopt the "side by side" or "physical relationship" argument put forward by counsel in *Stokes* v. *Whicher*. The result, it seems, would have been the same, for, "if one places the cheque and the receipt side by side it is not obvious on an inspection of them that they originally formed a single document and could be taken and read together." The reason for this lack of obvious connection

(*o*) [1958] Ch. 110, at p. 130.
(*p*) *Ibid.*, at p. 134.

was the discrepancy between the payees on the cheque and the signatory of the receipt.

In the result, therefore, a different, broader approach would have yielded no different answer. But it is interesting to note that for Jenkins L.J. it looks as if a cheque can *never* be added to another document so as to form a memorandum under the statute, whereas for Romer L.J. some cheques *might possibly* be so used, so long as the payee of the cheque and the other party to the contract were *one and the same person*. The *Timmins* case, it is suggested, therefore, leaves open for future discussion and decision two important points: (a) what will be the version of *Long* v. *Millar* that will eventually receive final approval?; and (b) will a cheque, signed by the defendant, ever be admitted in conjunction with some other document to provide a memorandum for the purposes of the Law of Property Act, 1925, and the law relating to guarantees?

TERMS OF AN ISSUE

Conflict with the Memorandum and Articles

By D. G. Rice, M.A., LL.B., PH.D., Barrister-at-Law

What is the effect of a conflict between on the one hand a company's memorandum and/or articles and on the other the terms on which its shares were originally issued?

It will be appreciated that this conflict may arise as a result of an alteration to the memorandum and/or articles made subsequently to the issue. In such a conflict we have a clash between two separate contracts both of which are on the face of it legally effective. As for the latter—frequently denoted the contract of allotment—this sets out the conditions on which shares are applied for by the public and allotted by the company. It defines the relationship existing between the subscribers and the company and is the only contract operative until such time as the subscribers are entered on the register of shareholders. However, the moment the contract of allotment is executed in this way another contract comes into existence, a contract entered into between the shareholders and the company and defined in the memorandum and articles (*a*). Now so long as the two contracts are in harmony no difficulty presents itself. But should they be at variance the problem immediately arises of determining the effect of such a conflict. It is the purpose of the present article to consider this question in the light of the cases, though it must be admitted from the outset that such legal authority as does exist is but slight.

Contract comprising the Terms of Issue

Before we proceed further, however, it is necessary to examine the construction of the contract comprising the terms of issue. This contract is contained in the prospectus (*b*), and no difficulty attends its interpretation so long as the prospectus merely sets out the conditions on which the shares are issued, without referring to the memorandum and articles. However, if, as will almost invariably be the case, the prospectus (or more accurately the application form

(*a*) For a discussion on the nature of this contract see the writer's article in *The Conveyancer*, Vol. 21, at pp. 438 *et seq*.

(*b*) It is assumed throughout this discussion that the shares are offered to the public.

accompanying it), after defining the terms of issue, goes on to say that the allotment is also subject to the memorandum and articles (*c*), problems may arise. For what will be the effect if the existing memorandum or articles conflict with the conditions set out in the prospectus? The most obvious answer is that the terms of issue will at those points of conflict be incapable of construction and in consequence they will be rendered meaningless and unenforceable (*d*). However, there is some authority for the view that as far as the contract of allotment is concerned the prospectus prevails over the memorandum and articles, and that the terms of issue must be construed accordingly. For in *Re Barned's Banking Co., Peel's Case* (*e*), where the plaintiff unsuccessfully sought the removal of his name from the company's register on the ground of misrepresentation, Lord Cairns L.J., although holding that the plaintiff had subscribed for shares on the footing not only of the prospectus but also of the memorandum and articles, would seem nevertheless to have found no difficulty in construing the contract of allotment. It was simply contained in the prospectus, the only question in issue being whether there had been a misrepresentation and whether the remedy consequent thereon had been lost for laches. It is arguable therefore that the inference to be drawn from this case is that where the terms set out in the prospectus are at variance with the memorandum and/or articles it is the former that truly defines the terms of issue. However, it is submitted that it is more logical to say that if the prospectus makes direct reference to the memorandum and articles it must thereby incorporate them into the terms of issue, and that if a conflict arises between the two documents any attempt at construction must be doomed to failure. Moreover, it is possible to explain away *Peel's Case* (*e*) on the ground that the question in issue was whether the plaintiff had come to be on the shareholders' register through a misrepresentation in the prospectus and not whether he had a right of rescission for breach of a term of his contract of allotment. The remedy of rescission for

(*c*) The prospectus may, of course, merely state that the conditions governing the allotment of the shares are contained in the memorandum and articles simpliciter. In this event the conditions are liable to modification along with alterations to the memorandum and/or articles (see Lindley M.R. in *Allen* v. *Gold Reefs of West Africa* [1900] 1 Ch. 656 (C.A.)) and, needless to say, conflicts between the terms of issue and the memorandum and/or articles cannot arise.

(*d*) Moreover, the same principle will apply if the prospectus stipulates that, apart from the conditions expressly set out therein, the allotment is also subject to the terms of a resolution passed under an article similar to Article 2 of Table A (which provides for the issue of shares with such rights attached thereto " as the company may from time to time by ordinary resolution determine ").

(*e*) (1867) L.R. 2 Ch.App. 674—one of the group of cases cited *post* at note (*d*) of p. 291—occurring around 1867 and dealing with the right of a shareholder to claim rescission where the objects as set out in the prospectus differed from those contained in the memorandum.

misrepresentation obtains irrespective of the legal existence of such a contract.

A more important problem, however, arises where the existing memorandum and articles incorporated into the terms of issue by the prospectus accord with it, but the company subsequently purports to alter the memorandum and/or articles in such a way that a conflict is created. For example, suppose the prospectus relating to an issue of preference shares prescribes that the holders shall receive a cumulative preference dividend of 5 per cent. per annum and the company purports to modify its articles (up till then conforming with the prospectus) so as to decrease the rate to 4 per cent., what is the effect of such a manoeuvre? The problem has never been judicially considered, but as the result of a conflict between the prospectus and the articles would, it is submitted, be to render the terms of issue unintelligible and, therefore, unenforceable—a completely undesirable outcome—the correct view must be that whatever the effect of such a manoeuvre on the overall problem of conflicts between the terms of issue on the one hand and the articles on the other it can have no bearing whatsoever on the interpretation to be placed on the contract of allotment. The inclusion of specific conditions in the prospectus must be for some purpose, and, if they can be completely overriden by changes in the articles or made ineffective by a subsequent rendering of the whole document void for uncertainty, a gross fraud will have been committed against the subscribing public. It is clear, then, that the terms of issue, even though expressed to be subject to the memorandum and articles (which are themselves liable to modification under the Companies Act, 1948) must, in the absence of an express provision to the contrary, remain fixed for all time. In other words, the stipulation contained in the application form that the issue is subject to the memorandum and articles means subject to the memorandum and articles in their present form and not as altered any time in the future.

Effect of Conflicts

Now that we have examined the interpretation to be placed on the contract comprising the terms of issue it falls to us to consider the effect of conflicts with the memorandum and/or articles. Of course, these conflicts can scarcely ever exist initially. For, as we have stated above, it is almost invariable practice for the conditions set out in the prospectus to be made subject to the memorandum and articles, and since the outcome of any conflict between those conditions and the existing memorandum and/or articles is to

render the terms of issue meaningless and unenforceable, any discussion of conflicts between the terms of issue on the one hand and the memorandum and/or articles on the other is quite otiose (*f*). It is clear therefore that the problem we have to consider only arises (a) where the company purports to alter its memorandum and/or articles and (b) the purported alteration conflicts with the terms of issue. Where these conditions apply three questions at once present themselves, *viz.*, (i) can a company alter its memorandum and/or articles in such a way that a conflict is created with the terms of issue, (ii) if it can, which prevail—the terms of issue or the memorandum and/or articles as altered (*g*) and (iii) if it is the latter, what remedy is available to a subscriber (*h*) for breach of the terms of issue? We will begin by considering the first two problems, deferring till later any discussion of the third.

Alteration of Memorandum and Articles

The first point to be realised is that a company's power to alter its articles raises more difficulties than its power to modify the memorandum. The only conditions normally found in the memorandum which are liable in practice to be altered are the objects

(*f*) If this submission is wrong and the true inference to be drawn from Lord Cairns L.J.'s observations in *Peel's Case* is that the terms of issue are as set out in the prospectus so that a discussion on the effect of a conflict is rendered necessary, the authorities clearly demonstrate that where the two documents are at variance it is always the memorandum and articles that will prevail: see *post* at p. 11. Moreover, a subscriber will have no better remedy for breach of contract than he has where the conflict comes into being after an alteration to the memorandum and/or articles.

(*g*) It is assumed throughout this examination that there is no conflict between the memorandum itself and the articles. However, should they be at variance it is clearly established by such cases as *Ashbury Railway Carriage & Iron Co.* v. *Riche* (1875) L.R. 7 H.L. 653, at p. 671, and *Guinness* v. *Land Corpn. of Ireland* (1882) 22 Ch.D. 349 (C.A.), at p. 381 (*cf.* also *Re Peveril Gold Mines* [1898] 1 Ch. 122 (C.A.)), that the memorandum will prevail over the articles. Admittedly, two Scots cases—*Re Oban & Aultmore-Glenlivet Distilleries* (1903) 5 F. (Ct. of Sess.) 1140 and *Re Marshall, Fleming & Co.*, 1938 S.C. 873—hold that where the articles are filed contemporaneously with the memorandum and contain a clause providing for the modification of the seemingly unalterable class rights set out in the memorandum, such a clause will operate to disturb the entrenched position of these rights. However, although it is undoubtedly English law that where class rights are set out in the memorandum they can be altered under the articles of association if the memorandum so provides (*Re Welsbach Incandescent Gas Light Co.* [1904] 1 Ch. 87 (C.A.)) and it is but a slight step forward to say, following Lord Keith in *Re Marshall Fleming & Co.*, that should the memorandum not expressly admit of modification under the articles, the mere filing of contemporaneous articles purporting to give power to alter the rights contained in the memorandum raises an implication that the memorandum can be altered in accordance with the articles, nevertheless, it is doubtful whether this principle can be applied to English law, particularly as the English authority *Ashbury* v. *Watson* (1885) 30 Ch.D. 376 (C.A.) clearly states that essential conditions (of which class rights are examples) cannot be modified if contained in the memorandum (except under the Companies Act, 1948, s. 206).

(*h*) It cannot be available to a transferee of shares after entry on the register, for he is not a party to the contract of allotment.

of the company and class rights, the former under section 5 of the Companies Act, 1948, the latter under section 206, and it is quite clear that both sections override anything that the terms of issue may contain. When, however, we turn to the articles of association, whose alteration is both simple and frequent, the position is far more complex. We will consider, then, the problems (i) and (ii) set out above in relation to the articles, beginning with the former.

Can a company alter its articles, if a conflict would thereby arise between the terms of issue and the articles as altered? For an answer to this question we have first to consider the general position governing a company's right to modify its articles. The whole problem revolves round section 10 of the Companies Act, 1948 (*i*), subsection (1) of which provides as follows:

> "Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles."

On the face of it, then, section 10 clearly provides that a company is free to modify its articles at any time, nor does it matter that shares may have been subscribed for on the faith of the articles in their original form. "The rights of a shareholder in respect of his shares, except so far as they may be protected by the memorandum of association, are by statute made liable to be altered by special resolution" (*k*). Furthermore, it is clear from the authorities (*l*) that this power of alteration will be unaffected even where there is an express stipulation in the articles purporting to exclude it (*m*). "A company cannot deprive itself of this power" (*n*).

So far all is clear. But what happens where a contract exists independently of the articles, a breach of which will in fact be committed, or will be rendered *intra vires* the company, by a proposed alteration to the articles under section 10? In these circumstances will the company lose its power of altering the articles? A clear case answering this question in the negative is *Punt* v. *Symons & Co.* (*o*), the facts of which were briefly as follows.

(*i*) Corresponding to the 1929 Act, s. 10, the 1908 Act, s. 13 (1), and the 1862 Act, s. 50.

(*k*) *Per* Cozens-Hardy L.J. in *Baily* v. *British Equitable Assurance Co.* [1904] 1 Ch. 374 (C.A.), at p. 385.

(*l*) *Walker* v. *London Tramways Co.* (1879) 12 Ch.D. 705; *Malleson* v. *National Insurance & Guarantee Corpn.* [1894] 1 Ch. 200; *Allen* v. *Gold Reefs of West Africa* [1900] 1 Ch. 656 (C.A.).

(*m*) It would seem, moreover, that the power cannot be impaired by any provision that the articles shall only be modified by a larger majority than that required for a special resolution under the Companies Act, 1948, s. 141: see *Ayre* v. *Skelsey's Adamant Cement Co.* (1905) 21 T.L.R. 464 (C.A.).

(*n*) *Per* Lindley L.J. in *Andrews* v. *Gas Meter Co.* [1897] 1 Ch. 361 (C.A.), at p. 369. See also the same learned judge's dictum in *Allen* v. *Gold Reefs of West Africa*, *supra*, at p. 671.

(*o*) [1903] 2 Ch. 506.

The trustees and executors of a will were empowered under an agreement made between the testator and a company to exercise the testator's function as governing director after his death. The agreement also provided that the company could not alter the clauses of the articles of association relating to the appointment of the testator as governing director, or do or suffer anything to be done in contravention of the provisions contained in those clauses. The defendants sought to pass a resolution altering the articles of association and thereby depriving the trustees and executors of their power. The plaintiff trustees and executors sought to restrain them. It was held, *inter alia*, following *Allen* v. *Gold Reefs of West Africa* (*p*), that a company cannot under any circumstances contract out of its statutory right to alter its articles. In the words of Byrne J. (*q*):

> ". . . the company cannot contract itself out of the right to alter its articles, though it cannot by altering its articles commit a breach of contract."

However, in 1915 a difficult case arose—*British Murac Syndicate* v. *Alperton Rubber Co.* (*r*)—where it was held that a company could be restrained from altering its articles. The facts of the case were briefly as follows. The A company contracted with the B company to allow the latter to elect two directors of the A company so long as it retained 5,000 shares in the A company. A clause to the same effect was contained in the articles of association. The A company sought to alter this clause, although the B company still held the 5,000 shares. The B company successfully obtained an injunction restraining the other company from carrying out the alteration. The court held that the A company was prevented from effecting the alteration by virtue of its independent contract with the B company. In the words of Sargant J. (*s*).:

> "The principal authority on the subject is *Allen* v. *Gold Reefs of West Africa* (*t*) where the court clearly recognised that a company cannot alter its articles so as to commit a breach of contract . . .
>
> "It has been said, and I think rightly said, that *Punt* v. *Symons & Co.* (*u*) is an express authority in favour of the defendant's contention, but so far as this point is concerned *Punt* v. *Symons & Co.* (*u*) seems to me to have been overruled by *Baily* v. *British Equitable Assurance Co.*" (*a*).

(*p*) *Supra.*
(*q*) At p. 511. See also the learned judge's observations at p. 514.
(*r*) [1915] 2 Ch. 186.
(*s*) At pp. 192–194.
(*t*) *Supra.*
(*u*) *Supra.*
(*a*) *Supra.*

It is submitted, however, that Sargant J.'s judgment is based on a misunderstanding of the true *ratio decidendi* of *Allen* v. *Gold Reefs of West Africa* (*t*) and *Baily* v. *British Equitable Assurance Co.* (*a*). All that these two cases lay down is that a company cannot by altering its articles escape from a contract existing independently of the articles. They do not hold that a company cannot alter its articles. That this is so is quite apparent from a careful reading of the judgments in question. Such phrases as "A company cannot break its contracts by altering its articles" (*b*), and "A company cannot, by altering its articles, justify a breach of contract" (*c*) do not imply that a company cannot alter its articles. All that is said is that such an alteration will not absolve the company from its liabilities under the contract. Any doubt, however, that there might be on this point has been dispelled by the more recent case of *Southern Foundries* (*1926*), *Ltd.* v. *Shirlaw* (*d*) the facts of which were briefly as follows. A company by an independent agreement appointed the plaintiff managing director for ten years, and a clause to this effect was embodied in the articles of association. Subsequently the article was altered by a special resolution, and the plaintiff dismissed. He, therefore, successfully sought damages for breach of his contract of service. Lord Porter said that, although the company was, of course, free to alter its articles of association, the plaintiff still had a remedy in damages for breach of contract. In the learned Law Lord's own words (*dd*):

> "A company cannot be precluded from altering its articles thereby giving itself power to act upon the provisions of the altered articles . . . but so to act may nevertheless be a breach of contract if it is contrary to a stipulation in a contract validly made before the alteration."

It can be seen, then, that the cases discussed so far show that a company is free to alter its articles of association (provided it does so in accordance with the machinery set up by the Companies Act, 1948 (*e*)), and it does not matter that it may have contracted in the articles of association not to exercise this right. Further, despite the reasoning of the judgment in *British Murac Syndicate* v. *Alperton Rubber Co.* (*f*) the authorities hold that a company may alter its articles of association, even though such an alteration may constitute, or render *intra vires* the company, a breach of an independent contract.

(*b*) *Per* Lindley M.R. in *Allen* v. *Gold Reefs of West Africa*, *supra*, at p. 673.
(*c*) *Per* Cozens-Hardy L.J. in *Baily* v. *British Equitable Assurance Co.*, *supra*, at p. 385.
(*d*) [1940] A.C. 701 (H.L.).
(*dd*) At pp. 740, 741.
(*e*) And in the interests of the company as a whole.
(*f*) *Supra*.

Nevertheless, one qualification has to be made to what has been said above. None of the four cases, *Punt* v. *Symons & Co.* (*g*), *Baily* v. *British Equitable Assurance Co.* (*h*), *British Murac Syndicate* v. *Alperton Rubber Co.* (*f*) and *Southern Foundries* (*1926*) *Ltd.* v. *Shirlaw* (*i*), was concerned with contracts defining the rights of shareholders. The agreements under discussion did not set out the terms subject to which shares were issued. It is arguable, therefore, that the principle acted on in the above cases has no application where the independent contract in question constitutes purely and simply the terms of issue. Moreover, there is one authority—though admittedly a slight one—suggesting that a company cannot alter its articles, if this would constitute a breach of the terms of issue or would render *intra vires* such a breach. For in *Allen* v. *Gold Reefs of West Africa* (*k*) Romer L.J. observed as follows (*l*):

> ". . . special contracts might be made with particular classes of shareholders or individuals, or special obligations to them might be incurred by the company, and that even by the original articles alone, which would prevent the articles being altered as against them, or prevent the alteration being enforceable against them."

And in the same case a similar view was expressed by Lindley M.R. (*m*):

> "I take it to be clear that an application for an allotment of shares on the terms of the company's articles does not exclude the power to alter them nor the application of them, when altered, to the shares so applied for and allotted. To exclude that power or the application of an altered article to particular shares, some clear and distinct agreement for that exclusion must be shown."

Unfortunately, the dicta are equivocal in that it is not clear whether the existence of a "special contract" was regarded as preventing the alteration of the articles, or merely the application of the articles as altered. However, there is a definite hint, if no more, that a company may not alter its articles, if the result would be a conflict between the articles as altered and the terms of issue. Further than this it would not be safe to go, particularly as the other member of the court in *Allen's Case* (*k*), Vaughan-Williams L.J., had the following observation to make (*n*):

(*g*) *Supra.*
(*h*) *Supra.*
(*i*) *Supra.*
(*k*) *Supra.*
(*l*) At p. 679.
(*m*) At p. 674.
(*n*) At p. 676.

> "We are further all agreed that a company cannot contract itself out of the statutory power of alteration conferred by section 50" (*o*).

Thus, returning to our original question—can a company alter its articles of association in such a way that a conflict arises between the articles and terms of issue?—as far as the cases are concerned, we find the answer indecisive. Although we have clear authority for the view that, where an independent contract exists unconnected with shareholders' rights, the company may alter its articles in such a way as to involve a conflict, no case is directly in point where the contract in question governs the rights subject to which the shares were issued. Dicta in *Allen* v. *Gold Reefs of West Africa* (*p*) hint, however, that in the latter event a company cannot modify its articles, if they would thereby be at variance with the contract constituting the terms of issue.

WHICH TO PREVAIL?

Whatever be the true answer to the above problem we will assume for the purpose of our discussion that a company is free to alter its articles, even though a conflict may thereby arise with the terms of issue. We next have to examine whether the terms of issue or the amended articles are to prevail, where they are at variance (*q*). In support of the view that effect will be given to the terms of issue we have the unanimous dicta of the members of the Court of Appeal in *Allen* v. *Gold Reefs of West Africa* (*p*). Thus, Lindley M.R. said (*r*):

> ". . . it does not by any means follow that the altered articles may not be inapplicable to some particular fully paid-up shareholder. He may have special rights against the company, which do not invalidate the resolution to alter the articles, but which may exempt him from the operation of the articles as altered."

and he went on to add (*s*) (adopting similar phraseology to that employed by Vaughan-Williams L.J. (*t*) and Romer L.J. (*u*))

> "It is easy to imagine cases in which even a member of the company may acquire by contract or otherwise special rights against the company, which exclude him from the operation of a subsequently altered article."

(*o*) Now s. 10.
(*p*) *Supra.*
(*q*) As regards contracts unconnected with shareholders' rights, no difficulty arises. The articles quite clearly prevail: *Southern Foundries (1926) Ltd.* v. *Shirlaw*, *supra*; *Punt* v. *Symons & Co.*, *supra.*
(*r*) At p. 672.
(*s*) At p. 674.
(*t*) At p. 676.
(*u*) At p. 679.

Thus, we have in the unanimous dicta of *Allen's Case* (*p*) authority (though not decisive) for the view that, where the articles as amended conflict with the terms of issue, the rights of shareholders will be determined by the latter and not the articles (*a*). Moreover, the fact that the dicta are unanimous makes *Allen's Case* (*b*) a stronger authority on the problem whether the terms of issue or the articles as altered should prevail, than it is on our earlier problem whether a company can alter its articles if the result would be a conflict with the terms of issue.

However, against these dicta in *Allen* v. *Gold Reefs of West Africa* (*b*) strong counter-arguments can be brought. For, first, it is quite clear that in those rare circumstances where the prospectus defines the terms of issue without making reference to the memorandum and articles, and a conflict arises between both documents (*c*), effect will always be given to the latter. This rule is most easily demonstrated in its application to the memorandum. For there exists a whole series of cases (*d*) where the plaintiff sought rescission of his contract for misrepresentation on the ground that the objects of the company as set out in the prospectus differed from those specified in the memorandum. Implicit in all these decisions is the assumption that the true objects of the company are those contained in the memorandum; and this assumption carries with it the inescapable inference that, where the memorandum and prospectus conflict, the former prevails.

It is more difficult to find any direct authority governing the situation where there is a conflict between the prospectus and the articles of association. As the objects of a company are invariably contained in the memorandum, all the numerous misrepresentation cases involving the scope of the objects are generally only relevant where there is a conflict between the prospectus and the memorandum. There is this exception, however. Although the objects must be contained in the memorandum, they can be amplified in the articles. There are, therefore, certain cases (*e*) where the objects as

(*a*) It is arguable that the dicta in *Allen's Case* are only applicable to shareholders who were also original subscribers. It is submitted, however, that it would be inconvenient in the extreme if, for example, an original subscriber were to receive 5 per cent. per annum on his preference shares in accordance with the prospectus, whilst a later purchaser from him were to get on the same shares only 4 per cent. per annum in accordance with the then existing articles. Clearly, then, the dicta must be interpreted widely. (*b*) *Supra.*

(*c*) Only, of course, when the subscribers have been entered on the register. Until then the contract of allotment is the only contract in existence.

(*d*) *Ship's Case* (1865) 2 De G.J. & Sm. 544; *Stewart's Case* (1866) 1 Ch.App. 574; *Webster's Case* (1866) L.R. 2 Eq. 741; *Lawrence's Case, Kincaid's Case* (1867) 2 Ch.App. 412; *Wilkinson's Case* (1867) 2 Ch.App. 536; *Oakes* v. *Turquand* (1867) L.R. 2 H.L. 325; *Downes* v. *Ship & Price* (1868) L.R. 3 H.L. (E. & Ir. App.) 343; *cf.* also *Peel's Case* (1867) L.R. 2 Ch.App. 674.

(*e*) *Hop & Malt Exchange Warehouse Co., Re, ex p. Briggs* (1866) L.R. 1 Eq. 483; *Wilkinson's Case, supra*; *Webster's Case, supra.*

amplified in the articles have conflicted with the prospectus and on each occasion the true objects were regarded as being those defined in the articles, the implication being that at points of variance the articles prevail over the prospectus. Moreover, it is to be noted that this conclusion is further supported by the practice of the courts, where they are discussing conflicts between the prospectus and the memorandum, in coupling the articles with the memorandum (*f*).

Now if, where there is a conflict between the terms of issue and the existing articles of association, the latter prevail, why on principle should the terms of issue be any more effective when they are at variance with the articles of association as altered? Further, cannot the position be compared with that existing on a sale of land? Just as originally the relations between the purchaser and vendor of land are governed by the contract of sale, similarly will not the rights of the allottees of shares initially be defined by the terms of issue? But as soon as the allottees have actually been entered on the register of shareholders, will not the relations between them and the company be determined solely by the memorandum and articles of association, which may possibly be altered from time to time, just as on a conveyance of land the relations between the vendor and purchaser are governed solely by the deed of conveyance? Admittedly, the deed of conveyance is not a second contract, so that the position is not strictly comparable. However, it is reasonable to suggest that an analogy can be drawn between entry on the shareholders' register and the execution of a conveyance.

It is submitted, then, that despite the unanimous dicta in *Allen* v. *Gold Reefs of West Africa* (*g*) the better view is that, where the terms of issue conflict with the articles of association, effect will be given to the latter. This conclusion carries with it, of course, the

(*f*) *e.g.*, Knight Bruce L.J. in *Ship's Case*, *supra*, at pp. 552, 553; Lord Cairns in *Peel's Case*, *supra*, at p. 684. It is interesting to note that where the conflict is with independent contracts other than the terms of issue, the articles likewise prevail. Thus, if a secretary has an independent contract for ten years' service with the company, but the company's articles provide that he may be dismissed at the will of the company, effect will be given to the articles, not the service contract: *Southern Foundries (1926), Ltd.* v. *Shirlaw*, *supra*. Nevertheless, he will undoubtedly be entitled to damages for breach of his service contract if, though the articles originally conformed with it, they were subsequently altered to enable the company to terminate the appointment. *Quaere*, however, whether any remedy lies in damages where the service contract actually conflicted with the articles at the time it came into being. Harman J. in *Read* v. *Astoria Garage (Streatham), Ltd.* [1952] 1 All E.R. 922 implied that there is none, but the Court of Appeal ([1952] Ch. 637) neither confirmed nor repudiated this view. *Cf.* also *Nelson* v. *James Nelson & Sons* [1914] 2 K.B. 770 (C.A.); *Bluett* v. *Stutchbury's Ltd.* (1908) 24 T.L.R. 469 (C.A.).

(*g*) *Supra*.

presupposition that a company has the right to modify its articles, even though a conflict may thereby arise with the terms of issue (*h*).

Remedy for Breach of Terms of Issue

We now come to our third problem. So far we have concluded that, where the terms of issue conflict with the memorandum and/or articles, effect will be given to the latter. It is natural to ask, then, what object there is in having an independent contract purporting to stipulate the terms subject to which shares are issued, if such a contract can be overridden by the memorandum or articles. Does the existence of such a contract enable a party to it (*i*) to obtain relief, if the memorandum and/or articles should conflict therewith? Has he a right of rescission or an action in damages or is he entitled to both remedies?

Now, where a plaintiff sues on the terms of the contract of allotment, he cannot rescind unless the particular term, of which there has been a breach (by virtue of a conflict with the memorandum and/or articles), is a condition of the contract as distinct from a mere warranty. It is extraordinarily doubtful whether in many instances such a term would be held to be a condition. Thus, suppose a prospectus provides that subscribers to an issue of preference shares shall receive a cumulative preference dividend of 6 per cent. per annum, and suppose subsequently after allotment the articles of the company are modified so as to reduce the dividend to 5 per cent. In such a case would the alteration be held to involve a breach of a condition? It is submitted that it would not, and that there would merely be a breach of a warranty. We see, then, that where the plaintiff sues for rescission for breach of a term of the contract of allotment, the chances of his succeeding are slight. Nor, indeed, is his position any better should he pursue an action in damages. For the case of *Re Addlestone Linoleum Co.* (*k*) (following *Houldsworth* v. *City of Glasgow Bank* (*l*)) lays it down that a shareholder cannot obtain damages, unless he also rescinds

(*h*) In the case of class rights, however, where there is a "variation of rights" clause, a company cannot modify its articles otherwise than in accordance with the terms of that clause. Moreover, the company's power of modifying class rights is further restricted by s. 72, which possibly operates even where no "variation of rights" clause exists. These restrictions are, of course, applicable regardless of whether or no a contract exists independently of the memorandum and articles setting out the terms of issue.

(*i*) *i.e.*, an original allottee or an assignee of his renounceable letter of allotment, but not a transferee of the shares after he has been entered on the register.

(*k*) (1887) 37 Ch.D. 191 (C.A.).

(*l*) (1880) 5 App.Cas. 317 (H.L.).

the contract of allotment (*m*). It is clear, then, that, if the plaintiff sues on the contract for breach of one of its terms arising out of a conflict with the memorandum and/or articles, he is unlikely to be successful either in a suit for rescission or an action for damages (*n*).

However, a shareholder might disregard his rights under the contract, and elect to sue merely for misrepresentation, arguing that he had been induced to take up the shares as a direct result of the company's misrepresentation. Thus, if a company should state in the prospectus that subscribers to an issue would receive a cumulative preference dividend of 6 per cent. per annum, and subsequently the company should, without the preference shareholders' consent, reduce the dividend to 5 per cent. by altering its articles, the preference shareholders might argue that there had been a misrepresentation, and, accordingly, sue on this account for rescission. However, once again the chances of success are

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(*m*) Lopes L.J. said at p. 206:

> ". . . *Houldsworth* v. *City of Glasgow Bank* decides that a shareholder cannot claim damages against the company of which he is a member for misrepresentations by which he was induced to take his shares, his proper remedy is rescission of the contract. Here rescission has become impossible, so the shareholder has no remedy at all against the company."

The reason for this inability to claim damages would seem to be based on the court's reluctance to prejudice the integrity of the share capital. In the words of Lindley L.J. at p. 206:

> " The principle on which the House of Lords decided *Houldsworth* v. *City of Glasgow Bank* was that a shareholder contracts to contribute a certain amount to be applied in payment of the debts and liabilities of the company, and that it is inconsistent with his position as a shareholder, while he remains such, to claim back any part of that money—he must not directly or indirectly receive back any part of it and this appears to me to govern the present case."

Of course, this argument completely ignores the possible or probable existence of a reserve fund which could be encroached on without interference with the share capital. Moreover, the complete withdrawal of a shareholder's contribution to the company's capital as distinct from the mere reduction thereof through a partial return by way of damages must, it is submitted, prejudice even more so the position of creditors and likewise may possibly jeopardise the other shareholders' contribution through causing the company to be without sufficient working capital. For a discussion of the interpretation of *Houldsworth's* case between Mr. J. A. Hornby and Prof. L. C. B. Gower see (1956) 19 M.L.R., pp. 54 *et seq.*, 61 and 185.

(*n*) It is interesting to note, however, that, if a shareholder has acquired shares from an issuing house or other seller (the prospectus forming the basis of the contract for sale), it would appear that he can bring an action in damages for breach of a term of this contract. Although under the rule in *Seddon* v. *North Eastern Salt Co.* [1905] 1 Ch. 326 (which presumably applies to actions brought under the contract as well as to actions for misrepresentation) he cannot, in the absence of fraud, rescind his contract, when once entered on the register of shareholders (the rule in *Seddon's Case* does not apply to those who have purchased from the company: see McCardie J. in *First National Reinsurance Co.* v. *Greenfield* [1921] 2 K.B. 260, at p. 272, following *Smith's Case* (1867) 2 Ch.App. 604), he is in practice better off than a shareholder who has contracted directly with the company, in that he will, it would seem, be able to obtain damages. Moreover, *Seddon's Case* though it has not been overruled, has been doubted in recent cases. (See Scrutton L.J. in *Lever Bros.* v. *Bell* [1931] 1 K.B. 557, at p. 588; Denning L.J. in *Solle* v. *Butcher* [1950] 1 K.B. 671 (C.A.), at pp. 695, 696; and Denning L.J. in *Leaf* v. *International Galleries* [1950] 2 K.B. 86 (C.A.), at p. 90.)

slight. For a misrepresentation in its legal sense cannot possibly come into being unless there first be a statement of fact, not a mere expression of intention, there being a clear distinction between the two (*o*). Now it is difficult to see how the particular term of issue conflicting with the memorandum and/or articles can in many instances constitute a fact, as distinct from a mere promise. Thus, if the company provides in its prospectus that a cumulative preference dividend of 6 per cent. per annum shall attach to the shares which are being offered for sale, the company is not stating a fact, it is merely expressing an intention (*p*) of adopting a certain course of conduct towards the preference shareholders. We may conclude, then, that a plaintiff who sues on the ground of misrepresentation, and not on the terms of the contract of allotment, will be unlikely to obtain a rescission of the contract for breach of its terms (*q*). Moreover, he will not obtain damages either, as an action based on misrepresentation is purely an equitable remedy (*r*), which does not afford relief in damages (*s*).

(*o*) See Mellish L.J. in *Beattie* v. *Ebury* (1872) 7 Ch.App. 777, at p. 804.

(*p*) However, a statement of an intention may amount to a misrepresentation in certain circumstances: see Bowen L.J. in *Edgington* v. *Fitzmaurice* (1885) 29 Ch.D. 459 at p. 483. The chances of this happening are directly related to the speed with which the alteration to the articles follows on the statement in the prospectus. It is to be noted, however, that as far as criminal law is concerned "a statement of intention about future conduct whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law." (*Per* Devlin J. in *R.* v. *Dent* [1955] 2 Q.B. 590, at p. 595.)

(*q*) Further, if the plaintiff acquired his shares from an issuing house or some other seller, and not directly from the company, under the rule in *Seddon's Case*, *supra*, he will not, in the absence of fraud, be entitled to rescind under any circumstances, when once he has been placed on the register of shareholders. See note (*n*) of p. 294, *ante*.

(*r*) Of course, in cases of fraud a shareholder could (where there is a misrepresentation of fact) obtain both rescission and damages (*Derry* v. *Peek* (1889) 14 App.Cas. 337 (H.L.)). Moreover, if he sued on the contract he would probably recover his loss of profit, since the measure of damages laid down in *McConnel* v. *Wright* [1903] 1 Ch. 546 (C.A.) is in effect that prescribed by the Sale of Goods Act, 1893, s. 53 (3), for breach of warranty of quality, and in determining for assessment of damages the value of the shares (calculated on the basis that the representation in question had been true) logically there is nothing to prevent a premium being added to the issue price (*cf.* Lord Atkin in *Clark* v. *Urquhart* [1930] A.C. 28 (H.L.) (N.I.), at p. 68). However, it is doubtful whether a company would be allowed to alter its articles if such a course would result in the perpetration of a fraud.

(*s*) In the unlikely event of a conflict between the terms of issue and the *existing* memorandum and/or articles (see *ante*, p. 284), clearly the remedy of rectification is not available. This is apparent from the court's want of jurisdiction to apply the remedy even for common mistake (*Evans* v. *Chapman* (1902) 86 L.T. 381; *Scott* v. *Frank F. Scott* (*London*) *Ltd.* [1940] Ch. 794 (C.A.)). The memorandum and articles constitute a statutory contract which can only be modified in the way laid down by the Companies Act, 1948. Moreover, the company itself cannot be compelled to rectify its memorandum and articles. For just as we have concluded that a company is free to alter its memorandum and articles even though a conflict may thereby arise with the terms of issue, similarly by analogy it must be free *not* to alter them when they are at variance with the contract subject to which the shares were issued.

It would, then, seem to follow from our discussion that the contract constituting the terms of issue confers a very tenuous benefit indeed upon those claiming under it. For the company is, apparently, always free to alter its memorandum and/or articles in such a way as to bring about a conflict with the terms of issue, and on this happening the authorities would seem to show that it is the former that will control the latter and not conversely. Moreover, not merely will the subscriber to an issue find the rights purporting to have been conferred on him on the allotment of his shares varied by alteration to the memorandum and/or articles but he would seem (except in the most unlikely circumstances) to be without any form of remedy either by way of a right of rescission or alternatively a claim in damages.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

Re Hamilton-Snowball's Conveyance [1958] 2 W.L.R. 957; [1958] 2 All E.R. 319 (Ch.D.)

Contract for sale of land—compensation in respect of derequisition between contract and completion—entitlement of vendor—Compensation (Defence) Act, 1939.—It is clearly established that between contract and completion a vendor of land is trustee, in a modified sense, for the purchaser (*Shaw* v. *Foster* (1872) L.R. 5 H.L. 321; *Lysaght* v. *Edwards* (1876) 2 Ch.D. 499). The vendor must look after the property properly and, subject thereto, both the chance of benefit and the risk of loss fall to the purchaser. But this rule may be less embracing than it seems when it comes to be applied. Thus a purchaser was not entitled to the benefit of the vendor's fire insurance (*Rayner* v. *Preston* (1881) 18 Ch.D. 1) and the Law of Property Act, 1925, s. 47, has not entirely remedied the position. Again, a sum for dilapidations paid under a lease expiring between contract and completion was held to belong to the vendor in *Re Lyne-Stephens and Scott-Miller's Contract* [1920] 1 Ch. 472. The *ratio* decided of the two decisions last named was that the contract was simply for the sale of a house with vacant possession, any right under policy or lease being independent and irrelevant.

This reasoning was applied by Upjohn J. in the present case, where under the Compensation (Defence) Act, 1939, a payment became due to the vendor, between contract and completion, as a result of the premises being derequisitioned. The learned judge held that the contract of sale did not include or comprehend this compensation money, which should have been expressly included if it was intended to pass. The moral for practitioners is obvious.

A similar conclusion had been reached in *Re Armitage's Contract* [1949] Ch. 666 by looking simply at the terms of the contract, but as the general law had not been considered there, Upjohn J. held that the decision was not really relevant, and did not imply a contrary conclusion in the absence of express terms.

Brown v. *Raphael* [1958] 2 W.L.R. 647; [1958] 2 All E.R. 79

Innocent misrepresentation—statement of opinion on inadequate grounds—sale of reversionary interest—death duties—aggregation.—At a sale by auction the plaintiff agreed to buy and the vendor (a trustee in bankruptcy) to sell a reversionary interest in a trust fund,

due to fall in on the death of an annuitant aged sixty-nine. The particulars stated that "estate duty will be payable on the death of the annuitant who is believed to have no aggregable estate," while the conditions added that this information was believed correct but the vendor took no responsibility as to the amount which would actually be payable. The name of the firm of solicitors acting in the sale was shown in heavy leaded type.

The statement as to the absence of aggregable estate was found to be inaccurate, and the purchaser sought rescission for innocent misrepresentation (charges of fraud having failed). The vendor's defence was that there was no misrepresentation of fact but merely a statement of opinion. The Court of Appeal (Lord Evershed M.R., Romer and Ormerod L.JJ.) held the purchaser entitled to rescind. The court relied in particular on the statement of Bowen L.J. in *Smith* v. *Land and Home Property Corporation* [1884] 28 Ch.D. 7 that "if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he implicitly states he knows facts which justify his opinion." In the present case, said Lord Evershed, the facts or the opportunity of knowing the facts about the possibility of aggregation were peculiarly within the knowledge of the vendor, while the emphasis given in the particulars to the name of the solicitors indicated that the belief was founded on substantial and reasonable grounds. Furthermore, it was shown that only half-hearted inquiries had been made. (The trouble in fact appears to have sprung from the inexperience in the relevant type of work of the solicitors' clerk who dealt with the matter.) Consequently the purchaser successfully established an untrue though innocent representation of fact and his reliance thereon—the conditions necessary for rescission.

This case may be compared with *Simmons* v. *Pennington* [1955] 1 W.L.R. 183; [1955] 1 All E.R. 240 (commented on editorially, *ante*, Vol. 19, p. 171, and noted at p. 219), where a general condition concerning covenants was not permitted to cover up a specific defect. The courts are not disposed to relax the rules concerning misrepresentation, misdescription or non-disclosure. "The most advisable course is to state the defect frankly and tell the purchaser to take it or leave it" (*ante*, Vol. 19, 171). In such a case as the present absence of information about death duties might damp the sale, but a vendor cannot encourage purchasers by a statement of inaccurate beliefs unless he has made adequate inquiries—when, of course, the beliefs would probably cease to be inaccurate.

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2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Re Triffit's Settlement [1958] 2 W.L.R. 927; [1958] 2 All E.R. 299 (Ch.D.)

Power of appointment—hybrid power—exclusion of objects and requirement of consent—ability to delegate—appointment on discretionary trusts.—The law relating to general and special powers

of appointment is fairly well settled. The applicability of the rules to the newer hybrid powers is still often a matter of doubt and conjecture. (For earlier discussions in this journal, see "Hybrid Powers" by J. G. Fleming, 13 *Conveyancer* 20, and "Consent Powers and Joint Powers" by F. R. Crane, 16 *Conveyancer* 565.) The present case raised directly—it is thought for the first time—the question of the applicability to a hybrid power of the maxim *delegatus non potest delegare*. The general rule is that the donee of a general power can delegate (*e.g.*, by appointing on discretionary trusts), but the donee of a special power may not unless the instrument creating the power so authorises (*Re Morris' Settlement Trusts* [1951] 2 All E.R. 528) though an appointment may include an ordinary power of advancement without infringing the rule (*Re Morris, supra*: *Re Mewburn's Settlement* [1934] Ch. 112).

Under a marriage settlement the first trust gave the wife power to appoint the trust fund to anyone except her father (one of the settlors) and any spouse of his and in such manner generally as she should think fit "with the consent . . . of the trustees for the time being hereof . . . which consent such trustees may withhold or give at their absolute discretion without being in any way liable for the exercise of such discretion." (This initial wide power may be compared with that in *Re Churston Settled Estates* [1954] Ch. 554, noted *ante*, Vol. 16, p. 183, and discussed in the above-mentioned article at Vol. 16, p. 565.) The wife now desired to appoint to the trustees of a new settlement to hold on various discretionary trusts, which did not offend the Rule against Perpetuities.

After some general references to hybrid powers and several of the cases, Upjohn J. held that the present power was not a general power equivalent to ownership, and therefore authority to delegate had to be sought in the terms of the power. He added that power to appoint to purposes as well as to persons could be implied (citing *Re Dilke* [1921] 1 Ch. 34 and *Re Harvey* [1950] 1 All E.R. 491) and that on the other hand power to appoint "in such manner" as the wife thought fit would not of itself authorise delegation (*Re Morris, supra*). Upjohn J. then held, following *Re Dilke, supra*, and *Re Phillips* [1931] 1 Ch. 347, that the trustees were required to consent only to the exercise of the power, and did not have any duty to supervise the selection of objects. For example, the wife could appoint to herself or any other object except those expressly excluded; the power was for her benefit and in no way fiduciary. (Here, the learned judge referred to *Re Greaves* [1954] Ch. 434 (noted, *ante*, Vol. 16, p. 310), a case on revocation of appointments and fraud on the power; it may be submitted, with respect, that on the question of trust or power *Re Mills* [1930] 1 Ch. 654 is somewhat more in point.) Having regard to these matters Upjohn J. held that "in a widely drawn power such as this, it is to be implied that the plaintiff can delegate the discretionary powers entirely." The ability to delegate is to be tested, therefore, by the nature of the objects of the power rather than by the existence of the requirement of consent (see 16 *Conveyancer* at pp. 574, 575).

Re Wills' Will Trusts [1958] 3 W.L.R. 101; [1958] 2 All E.R. 427 (Ch.D.)

Power of advancement—perpetuity—exercise—" raising " of part by way of settlement.—A testator gave the residue of his estate to his sons and daughters, the sons' shares to vest on their attaining twenty-five and the daughters' shares being settled. The trustees of the will were given a wide power of advancement " to raise [up to] one moiety of the then expectant contingent presumptive or vested share portion or legacy of any person under the trusts . . . and to apply the same for his or her advancement or benefit or for the benefit of any child, children or wife of such person as my trustees shall think fit." The testator left five infant children. W., the testator's eldest son, attained twenty-five in October, 1940, and died on war service in 1943, leaving, *inter alia,* two-thirds of his residue to his children at twenty-one. He left three sons, twins born in 1940 and a third son born in 1941. In June, 1940, the trustees by deed in purported exercise of the power of advancement appropriated certain investments forming part of the trust fund for the twins, then a fortnight old, contingently on their attaining twenty-one. There was thus a direct conflict of interest between the twins and the younger son.

The power of advancement was first attacked on the score of perpetuity in that (apparently—the argument is not fully reported) though the principal beneficiaries were the only lives in being, the power could be exercised during the lives of the wife and children of any such beneficiary. (Compare *Re Coleman* [1936] Ch. 528; *Re Johnson* [1943] Ch. 341; for a contrary view, see Morris and Leach, *The Rule against Perpetuities,* at p. 135.) Upjohn J. found it unnecessary to go into these arguments since he held, first, that " vested " meant vested in interest, so that as regards a son's share the power ceased when he attained twenty-five, and second, that even if the power was void as regards daughters' shares, it was severable and so again good as regards a son's share. In effect it seems that the learned judge held there were several powers, some good, some perhaps bad—compare *Re De Sommery* [1912] 1 Ch. 622.

The main question, therefore, was whether the power had been validly exercised. A number of reported cases show that settlements by way of advancement have been authorised (*e.g., Roper-Curzon* v. *Roper-Curzon* (1871) L.R. 11 Eq. 452; *Re Halsted's Will Trusts* [1937] 2 All E.R. 570; *Re Ropner's Settlement Trusts* [1956] 3 All E.R. 332, noted *ante,* Vol. 20, p. 405; compare *Re Meux's Will Trusts* [1958] Ch. 154, noted *ante,* Vol. 21, p. 388), though the maxim *delegatus non potest delegare* normally prevents the trustees of the derivative settlement being given discretions other than a normal power of advancement (*Re Morris' Settlement Trusts* [1951] 2 All E.R. 528; *Re Triffit,* noted *supra*). In the instant case Upjohn J. held the above authorities binding on him, though conceding that the power to settle by way of advancement might not have been fully argued in any of them. He further found the provision made for the infant twin sons to be both a " raising " of money in a broad sense and an application for the infants' benefit, and consequently a valid exercise of the power.

The learned judge added "trustees cannot under the guise of making an advancement create new trusts merely because they think that they can devise better trusts than those which the settlor has chosen to declare. They must honestly have in mind some particular circumstances making it right to apply funds for the benefit of an object or objects of the power. Having reached the conclusion that some application is right and proper, it is in my judgment a question to be determined in all the circumstances of the case whether the application should be out and out or whether it is desirable to create certain trusts" ([1958] 3 W.L.R. at p. 109; [1956] 2 All E.R. at p. 479).

Grey v. *Inland Revenue Commissioners*
[1958] 3 W.L.R. 45; [1958] 2 All E.R. 443 (C.A.)

Oughtred v. *Inland Revenue Commissioners*
[1958] 3 W.L.R. 64; [1958] 2 All E.R. 443 (C.A.)

Trusts of equitable interests in personalty—creation—directions to trustees—constructive trusts—whether writing required—Law of Property Act, 1925, *s.* 53.—These two cases, noted together, *ante,* p. 141, have now passed the Court of Appeal and leave to appeal to the House of Lords has been given. Consequently an elaborate note does not seem necessary at this point.

Grey v. *I. R. C.* The Court of Appeal by a majority (Morris and Ormerod L.JJ., Lord Evershed M.R. dissenting) has reversed the decision of Upjohn J. and has held that a direction to trustees to hold on new trusts, given by a person solely entitled to an equitable interest in personalty, amounted to a "disposition" within section 53 (1) (c) of the Law of Property Act, 1925, so that writing was necessary for it to be effective. All three members of the court agreed, first, that the point was a short one of principle not yet covered by authority, and, second, that the transaction was not an assignment. The majority thought, however, that there was a "disposition" because the beneficial interest did pass; it was, in the colloquial phrase used by Lord Evershed and Ormerod L.J. "got rid of." Lord Evershed, who delivered the most elaborate judgment and considered in some detail the earlier cases (see p. 141, *ante*) thought the above analysis an over-simplification, pointing out that a declaration of trust "gets rid of" the beneficial interest, and so does the destruction of an equitable interest (as on a purchase for value, without notice, of the legal estate) without in either case there being a "disposition." He therefore took the view that a direction to trustees was no more a disposition than a declaration of trust and that in both cases the effect of overriding or varying existing equitable interests was incidental and irrelevant.

At the moment, therefore, judicial opinion stands equally divided.

Oughtred v. *I. R. C.* Here the Court of Appeal (Lord Evershed M.R., Morris and Ormerod L.JJ.) have unanimously overruled the decision of Upjohn J. They did not accept his view of the effect of the Law of Property Act, s. 53 (2) on an agreement to transfer an

equitable interest in personalty (see, *ante*, p. 143). The appeal was decided, however, on a new argument by the Crown to the effect that the whole transaction amounted to no more than an agreement for sale followed by a conveyance in the usual way. This view of the matter made unnecessary the very refined reasoning adopted in the court of first instance (see *ante*, p. 143, for some criticisms thereof).

[See also notes *post*, pp. 311–312.]

Re Allsopp's Marriage Settlement Trusts [1958] 3 W.L.R. 78; [1958] 2 All E.R. 393 (Ch.D.)

Variation of settlement by order of court—husband to be deemed dead—effect on protected life interest.—By a marriage settlement the husband was given, after the death of his wife, a protected life interest in the usual form—to pay the income to him until he charged, etc., and thereafter to hold it on discretionary trusts for him and the issue of the marriage. The marriage having been subsequently dissolved the settlement was varied by an order of the Divorce Court "extinguishing all rights powers and interests of [the husband] as if he were already dead." It will be seen that there is some contradiction in the quoted words. Only the husband's rights are specifically extinguished, yet the reference to his death presupposes the cessation of a life on which the rights of the issue depended. Moreover, other clauses of the order referred to the husband as living. Obviously a more definite order would be desirable. In the present case Vaisey J., though recognising that one document does not amend another unless the intention is plain, held that the discretionary trust was so engrafted upon the husband's life interest that it must fail, despite the adverse effect on the issue of the marriage.

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3. *WILLS*

By A. Kiralfy, Barrister-at-Law

In the Estate of Coleman [1958] 1 W.L.R. 457; [1958] 2 All E.R. 35

Soldier's privileged will—army of occupation—held active military service.—The testator in this case was an infant, so that, although the will was properly executed, it stood or fell with his military status. He was serving with the British Army of the Rhine when he died in 1954, nine years after the German surrender. Karminski J. held that the will was privileged and valid. He did not essay any general proposition about hot and cold wars, since the solution was to be found in dicta in the Court of Appeal in *Re Wingham* [1949] P. 187. Not only does active military service include cases of present war and imminent future war (neither of which applied here) but also

cases connected with a " war . . . which . . . had been in progress." Occupation forces, though now rather considered as allies, had first entered Germany as a result of hostilities with that country, and the causal connection had not been completely broken (*e.g.*, we still dispute about " occupation costs "). Had this case happened during actual hostilities in Cyprus or Malaya it is thought that the courts would regard these as actual wars for the purpose of soldiers' wills, while cases like Suez would be wars actual or imminent. It is in fact difficult, and rightly so, to think of a case of a serviceman in danger who would not be covered by the rules.

(Theobald 60.)

In the Estate of Denning [1958] 1 W.L.R. 462; [1958] 2 All E.R. 1

Formalities of will—signatures on back—will upheld.—In this case the whole of one side of a sheet of paper was covered by the testator's signature and dispositions. Two signatures were written on the back, but without defining the quality in which these persons, neither of whom could be traced, had signed. Sachs J. held that there was no obvious reason for such signatures unless they were meant as an attestation, though he thought this was an extreme case. The books say that an attestation need not be in a particular place on the will so long as it appears that it was intended as an attestation. The problem in this case was the complete absence of explanation, such as " signed " or " witnessed." *In b. Peverett* [1902] P. 205 was applied and extended.

(Theobald 39, 85.)

Re Trott [1958] 1 W.L.R. 604; [1958] 2 All E.R. 296

Posthumous child—application for family provision out of time—extension—Inheritance (Family Provision) Act, 1938 (*as amended*).—This is, with respect, a very reasonable decision, as are most decisions on the interpretation of the Act in recent years. The testator made his will in 1951 and died in 1954, leaving most of his estate to the children of his first marriage. In 1955 a posthumous daughter of the second marriage was born, and he had known the child was expected. The widow applied for provision within six months of the death; the child was born within five months of the grant of probate but, owing to legal aid applications, eight months elapsed between the grant and the child's application. Upjohn J. held that the birth of a posthumous child is a " circumstance affecting the administration of the estate," which therefore gave the court jurisdiction to extend the time for application, and he immediately upheld the late application. An earlier application could hardly have been expected.

(Theobald 99.)

In the Estate of Haslip [1958] 1 W.L.R. 583; [1958] 2 All E.R. 275

Administrator pendente lite—sole administrator appointed—Judicature Act, 1925, *s.* 163 (1).—This is a short but important point. As a general rule two administrators or a trust corporation must be appointed under section 160 of the Judicature Act if there is a minority or a life interest. Section 163, however, is rather a special case. The administrator *pendente lite* is under the constant supervision of the court. Again, contrary to the general rule about trustees, the court may provide for his remuneration out of the estate. To appoint two administrators of this kind would therefore, Karminski J. held, be unnecessary and wasteful (following *In the Estate of Lindley*, [1953] P. 303).

(Williams on *Executors*, Vol. 1, pp. 228, 229, 230.)

Re Birmingham, Savage v. *Stannard* [1958] 3 W.L.R. 10; [1958] 2 All E.R. 275

Specific devise—unpaid purchase money—liability of devisee—Administration of Estates Act, 1925, *s.* 35.—This is a decision on an important point, since it was not argued when it arose in *Re Wakefield* [1943] W.N. 169. Section 35 of the Administration of Estates Act specifically includes the "lien for unpaid purchase money" among the charges which must be borne by land devised and will not be paid out of residue. It is very arguable whether the reasons for property subject to mortgages having to bear such mortgages really apply to the case of an incompleted purchase, but the words of the Act are unalterable in the absence of some contrary intention appearing in the will. In the instant case the testatrix had paid 10 per cent. deposit on a house and signed the contract. Completion was fixed but she died six days earlier. The testatrix executed a codicil giving the house specifically to her daughter after the date of the contract, and at a time when she appears to have been about to pay the remaining 90 per cent. in cash, there being no reference to any dealings with any possible mortgagees. The sudden death of the testatrix was held to have defeated these plans, since the daughter must herself repay the executors the 90 per cent. of the purchase price, which they had laid out without prejudice in the meantime. Two unsuccessful flank attacks were launched: an attempt was made to deny that the vendor's lien existed before completion or where there was no evidence that the money would not be paid in the ordinary way; another attempt was found to spell out a contrary intention from circumstances which could not be found in the documents. The result may be in accord with the authorities but, this being a new point, it seems hard that a more common-sense point of view could not have been adopted. As in recent cases on election, it is thought that making persons pay for their gifts is hardly an ideal legal position. Since the wording of the statute is clear, possibly some application of the doctrine of conversion might be made, and thus the 90 per cent. of the money treated as realty

to which the daughter was entitled, once the testatrix had become equitably entitled to the land and bound by contract to buy it. A bequest of 10 per cent. of the value of a house is hardly compatible with a specific devise of a "house, free of duties." The argument that unpaid purchase money refers to a case of resistance by the testatrix to pay the money, and not to the accident of death, might well be accepted.

(Theobald 700.)

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4. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Davies v. *Price and others* [1958] 1 W.L.R. 434; [1958] 1 All E.R. 671 (C.A.)

Agricultural Holdings Act, 1948—*notice to quit—interests of efficient farming—duty of agricultural land tribunal—practice—certiorari or case stated.*—This was an application for an order of certiorari to quash the decision of an agricultural land tribunal which had confirmed a decision of the Minister to give his consent to the operation of a notice to quit. This consent had been given (through the local agricultural executive committee) upon the ground specified in section 25 (1) (a) of the Agricultural Holdings Act, 1948, namely that the carrying out of the purpose for which the landlord proposed to terminate the tenancy was desirable in the interests of efficient farming. The tribunal stated in their finding that the landlords had satisfied them that it was in the interests of efficient farming of the land to terminate the tenancy: but the only reason they gave in support of their decision was that the tenant was an inefficient farmer. The Court of Appeal held that section 25 (1) (a) of the Act requires a tribunal to compare the existing régime under the existing tenant with the régime which is proposed by the landlord in the event of the termination of the existing tenancy, and that it is not sufficient to show that the existing tenant is a bad farmer. But there was nothing on the face of the record to show that the tribunal in the present case had failed to make the right comparison. Nor was there any evidence that the tribunal had exceeded its jurisdiction, since they clearly had jurisdiction to decide whether or not to give their consent. They might, of course, have erred in law in reaching their decision: but in that event the proper remedy is an appeal by way of case stated under section 6 of the Agriculture (Miscellaneous Provisions) Act, 1954, not an application for an order of certiorari.

It was also argued that the "statement of case and general grounds for the Minister's decision" prepared for the tribunal by the local agricultural executive committee under the Agriculture (Procedure of Agricultural Land Tribunals) Order, 1954 (S.I. No. 1138 of 1954) was part of the record. It was held, however, that even if this was so (which was not decided), this document did not assist the court, since the hearing before an agricultural land tribunal is a hearing

de novo, rather than an appeal, at which new facts and new arguments can be adduced.

Although section 25 (1) of the Act of 1948 will soon be drastically amended if the Agriculture Bill now before Parliament becomes law, it seems that the decision on the point of construction in this case may well apply to the subsection in its new form.

Costagliola v. *Bunting* [1958] 1 W.L.R. 580; [1958] 1 All E.R. 846 (Q.B.D.)

Agricultural Holdings Act, 1948—*notice to quit—"tenant with whom the contract of tenancy was made"—whether administratrix of deceased tenant included.*—Gorman J. held in this case that an administratrix of a deceased tenant is not a "tenant with whom the contract of tenancy was made" within the meaning of section 24 (2) (8) of the Agricultural Holdings Act, 1948. It is true that under section 94 (1) of the Act the expression "tenant" is defined to include "the executors, administrators, assigns, committee of the estate of or trustee in bankruptcy of a tenant or other person deriving title from a tenant," unless, of course, the context otherwise requires. But the words "with whom the contract of tenancy was made" in section 24 (2) (8) have a limiting effect upon the definition of tenant in section 94 (1). Since, therefore, no consent had been given under section 24 (1) to the operation of the notice to quit served upon the administratrix, that notice to quit was of no effect.

Re Nos. 55 & 57 Holmes Road, Kentish Town [1958] 2 W.L.R. 975; [1958] 2 All E.R. 311 (Ch.D.)

Landlord and Tenant Act, 1954—*business premises—application for new tenancy—summons naming wrong respondents—amended summons served out of time—whether amendment proper.*—This was an application for a new tenancy of business premises under section 24 (1) of the Landlord and Tenant Act, 1954. In 1932 the applicants took an assignment of a lease originally granted by Birch Brothers, Ltd., in 1907. In 1947, Birch Brothers, Ltd., assigned the freehold reversion to Birch Brothers (Properties) Ltd., which was a separate company, even though both companies had a common office, a common directorate and a common secretary. In April, 1957, Birch Brothers (Properties) Ltd. served a notice to terminate the tenancy at Christmas, 1957, upon the expiration of the original term. In June, 1957, the applicants served a counter notice on Birch Brothers (Properties) Ltd., stating their unwillingness to give up possession of the premises: and on July 30, 1957, they served on the common secretary of both companies an originating summons applying for a new tenancy; but the summons named Birch Brothers, Ltd. (not Birch Brothers (Properties) Ltd., the landlords) as respondents. In October, 1957, the summons was amended by leave of the master, and the amended summons was served on Birch Brothers (Properties) Ltd.,

who, however, contended that the amendment should never have been allowed, since at the time when the amendment was made the period allowed by section 29 of the Act for making an application for a new tenancy had already expired. Harman J. upheld this contention. This was not a case of a mere misnomer, since there were in this case two separate existing companies, and the applicants, knowing of the existence of both companies, and knowing also which of these two companies was the landlord company, chose to serve the summons upon the other. Further, when once the period of four months from the service of the landlords' notice had expired, the landlords had acquired a vested right of which they ought not to be deprived by an amendment of the summons. The name of the landlord company, Birch Brothers (Properties), Ltd., was therefore struck out.

Cusack-Smith and others v. *Gold and others*
[1958] 1 W.L.R. 611; [1958] 2 All E.R. 361 (Q.B.D.)

Leasehold Property (Repairs) Act, 1938—*action for damages for breach of repairing covenants—whether lessee no longer in possession entitled to the benefit of the Act.*—Pilcher J. held in this case that an assignee of a lease, who has parted with all his estate and interest in the demised premises, is not entitled to receive a notice under section 1 of the Leasehold Property (Repairs) Act, 1938, before an action for damages is brought against him. The benefit of this Act is confined, in his view, to persons who are entitled to receive a notice under section 146 of the Law of Property Act, 1925, before proceedings are taken for re-entry or forfeiture. A person who has divested himself of all present estate and interest in the premises does not fall within that category.

Alliance Building Society v. *Pinwill* [1958] 3 W.L.R. 1;
[1958] 2 All E.R. 408 (Ch.D.)

Rent Act, 1957—*notice to quit—premises let as a dwelling—requirement of four weeks' notice—whether applicable to mortgagor under an attornment clause.*—A mortgage deed contained a clause whereby the mortgagor attorned tenant to the mortgagees at the yearly rent of a peppercorn, if demanded. The same clause provided that the mortgagees might at any time after their power of sale had become exercisable terminate the tenancy by giving the mortgagor at least seven days' notice to quit. The mortgagees gave ten days' notice to quit under this clause; but the mortgagor resisted their claim to possession on the ground that the notice did not comply with section 16 of the Rent Act, 1957, which provides that no notice by a landlord or a tenant to quit any premises let as a dwelling shall be valid unless it is given not less than four weeks before the date on which it is to take effect. Vaisey J. held that section 16 of the Act of 1957 did not apply to this case. That section, in his opinion, " protects a real tenant against a real landlord under a real ' residential letting ' and is

not intended to, and does not, benefit a mortgagor to the detriment of his mortgagee." He recognised, however, that there may be cases in which the section may apply to a tenancy created by an attornment clause in a mortgage, as, for example, where the rent received is a full rack rent, or where the mortgagor is obliged by the terms of his mortgage to reside on the premises. But upon the facts of the present case he made an order for possession, since there was neither a "landlord," nor a "tenant," nor premises "let as a dwelling-house" within the meaning of section 16 of the Act.

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5. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports it is cited from *Annotated Tax Cases* (A.T.C.), *Taxation Reports* (T.R.) or *The Times*.)

Westminster Bank Ltd. v. *Barford* [1958] T.R. 113

Income Tax—Director—Payments accruing after death

Statutory provisions: Income Tax Act, 1952, s. 123 (1) (Sch. D., Case III).

Point: It would appear that although the assessment under Case II of Schedule D during the lifetime of a person exercising a profession may frank receipts of that profession accruing after his death, unless such receipts stem from some source other than the professional activity, the same result is not so easily achieved where the deceased was taxable under Schedule E. In *Stainer's Executors* v. *Purchase* [1952] A.C. 280 and more recently in *Carson* v. *Cheyney's Executors* [1957] 3 W.L.R. 768 (noted at Vol. 22, p. 72, *ante*), receipts from contracts made by the deceased, in one case an actor and in the other an author, coming to his executors after his death were held not taxable. The argument in each case that the receipts were taxable under Case III of Schedule D after the death, a new source, namely the agreement or the copyright giving rise to the liability, was rejected. The exemption from tax rests upon the source of income being the work of the deceased and no other source which survives the death being responsible for the accruer of income. It would appear from the present case that the court is not prepared where the deceased was taxable under Schedule E to treat payments coming to him by reason of a contract as stemming from the source of his labour only. The reason for the distinction does not, however, appear.

Facts and decision: The deceased, who was chairman of a company, undertook certain special services for the company. By an agreement between the company and its chairman it was provided that in consideration of the performance of the special services the company should pay to the chairman, his executors, administrators or assigns, a sum of £3,000 immediately and periodical payments until

1958. Certain of these periodical payments accrued after the death of the deceased and assessments were made under Schedule D on his executors. It was argued that the chairman could have been charged under Schedule E on the value of the total benefits accruing to him under the agreement, but no such assessment was in fact made. It was presumably further argued that the possible assessment under Schedule E ousted any assessment under Case III of Schedule D on the annual payments.

Held: By Mr. Justice Vaisey, that the agreement was an independent source which generated income and the annual payments were taxable under Schedule D. He stated "the benefit which he received from the company was a contract for the payment of periodical sums of indeterminate amounts which were always subject to and never free from tax. Even if the annual sums payable during Mr. McCurdy's life were in strictness as they came to his hands under Schedule E, I cannot see how that could affect the liability to tax of the actual recipients of the same sum after his death."

The agreement rather than the services of the deceased was the source of the income payments.

The Public Trustee v. *I. R. C.*
The Times, June 27, 1958 (C.A.)

Estate duty—Gift to holder of an office—Relationship between s. 1 and s. 2 of Finance Act, 1894

Statutory provisions: Finance Act, 1894, ss. 1 and 2 (1) (b).

Point: The relationship between sections 1 and 2 of Finance Act, 1894, was set out by Lord MacNaghten in *Earl Cowley* v. *I. R. C.* [1899] A.C. 198, at pp. 212–213 in the following manner:

> "Now, if the case falls within section 1 it cannot also come within section 2. The two sections are mutually exclusive. Section 1 might properly, I think, be headed 'with regard to property passing on death, be it enacted as follows.' Section 2 might with equal propriety be headed 'and with regard to property not passing on death, be it enacted as follows.' I cannot, therefore, agree with Rigby L.J. when he says that section 2 is a provision 'explanatory' to section 1. In my opinion the two sections are quite distinct, and section 2 throws no light on section 1. But, then, no doubt section 2 speaks of 'property in which the deceased . . . had an interest ceasing on the death of the deceased.' And that, it may be said, was just the position of the Second Earl with regard to the Mornington Settled Estates. So it was. But section 2 does not apply to an interest in property which passes on the death of the deceased. That is already dealt with in the earlier section."

This basic dichotomy has been acted upon ever since, but some doubt was thrown on its validity by the judgment of Lord Radcliffe in *Sanderson* v. *I. R. C.* [1956] A.C. 491.

The present case produces an anomaly if this dichotomy correctly represents the law. The question at issue was whether the exclusion

of property the interest in which of the deceased was only an interest as a holder of an office, applied alike to sections 1 and 2 (1) (b). Mr. Justice Danckwerts ([1958] 2 W.L.R. 429) and the Court of Appeal considered themselves bound by the above-quoted passage from the judgment of Lord Macnaghten in holding that the two sections must be read separately and that the exemption in section 2 (1) (b) does not apply in the case of a section 1 passing.

Facts and decision: A beneficiary was entitled to the income of a proportionate part of the estate as the executor of the testator. The gift to him in the will was expressed as being " during his life so long as he shall act as executor and trustee of this my will by way of remuneration for so doing and in addition to any professional charges which he may be entitled to make in accordance with clause 23 of this my will." He was thus entitled to an interest, within the wording of Finance Act, 1894, s. 2 (1) (b), as " only an interest as holder of an office." On the death of the beneficiary a share of the corpus of the trust estate corresponding to the share of the income to which at his death the beneficiary had been entitled passed within the terms of section 1 of the Finance Act, 1894. It was agreed that had the only charge to duty arisen by reason of the cesser on the death of the beneficiary of his interest within Finance Act, 1894, s. 2 (1) (b), no duty would have been payable in view of the exemption in favour of the interest of the holder of an office.

Held: That nothing had happened to justify the court in saying that the matter was open for review in the Court of Appeal and that the exemption in section 2 (1) (b) did not apply to a passing under section 1. Estate duty was therefore payable on the death of the executor, although he had only had an interest as such executor.

Leave to appeal to the House of Lords was granted.

Re Beare [1958] T.R. 181 (Ch.D.)

Estate duty—Commorientes—Presumption of Survivorship

Statutory provision: Law of Property Act, 1925, s. 184.

Point: Although not directly concerned with the legislation relating to estate duty, the result of this case affected considerably the estate duty exigible pursuant to a common calamity. When two persons die in circumstances rendering it uncertain which of them survived the other, such deaths are for all purposes affecting title to property presumed to have occurred in order of seniority, the younger being deemed to have survived the elder. This statutory presumption, found in Law of Property Act, 1925, s. 184, can only be upset by proof of which survived the other or of contemporaneous death. Mere speculation, however well informed, as to the possibility of survivorship is insufficient to rebut the presumption. In consequence it may happen that estate duty can become payable on the same property in respect of each death.

Facts and decision: A husband and wife were killed when their car crashed during a motor rally. The car having turned upside down, both were killed due to inhalation of mud and water. The

husband's brain was bruised in a manner, according to the medical evidence, likely to have caused unconsciousness but not death. The expert opinion was, therefore, that the unconscious husband would be likely to have survived the conscious wife as her struggles would be likely to have caused more rapid inhalation of the mud and water, but the time between the two deaths was likely to have been only about a minute.

Held: The evidence was equivocal showing merely a possibility of one order of death, whereas another order was equally possible if the resistance of one party had been greater than another. The statutory presumption that they died in order of seniority therefore prevailed.

By Clause 24 (1) of the Finance Bill, 1958, so far as estate duty is concerned, the statutory presumption in section 184 of the Law of Property Act, 1925, is displaced. If two or more persons die in circumstances rendering it uncertain which of them survived the other, the property chargeable to estate duty in respect of each death will, where the deaths occurred after April 15, 1958 (Budget day), be ascertained as if they had died at the same instant and all relevant property had devolved accordingly.

Grey and another v. *I. R. C.* [1958] 3 W.L.R. 45; [1958] 2 All E.R. 428; [1958] T.R. 165 (C.A.)

Stamp duty—Oral direction to trustees—Deed of declaration

Statutory provisions: Stamp Act, 1891, Sch. I; Finance (1909–10) Act, 1910, s. 74 (1); Law of Property Act, 1925, s. 51 (1) (c).

Point: The Court of Appeal by a majority of two to one have reversed the decision of Mr. Justice Upjohn (noted at Vol. 22, p. 157, *ante*) in holding that where shares are held by nominees and the absolute beneficial owner directs the nominees to henceforth hold such shares upon trusts for certain beneficiaries, such action, if effective, would be a "disposition" of an equitable interest and in consequence need to be in writing in order to be valid by reason of Law of Property Act, 1925, s. 53 (1) (c). In consequence, where the settlor gave oral directions to trustees who held shares for him as bare nominees, that they should henceforth hold such shares on the trusts of a settlement previously created by the settlor, and the trustees subsequently executed a deed of declaration of trust setting out the direction, and declaring that the trustees were holding the shares on the trusts of the settlements, which declaration was also executed by the settlor, the declaration became liable to *ad valorem* stamp duty under Finance (1909–10) Act, 1910, s. 74, the prior oral declaration having been ineffective to pass the equitable interest.

The sole question before the court was whether the oral declaration was a "disposition" within section 53 (1) (c), the further contention of the Revenue based upon treating the oral declaration and declaration of trust as all one transaction by virtue of *Cohen and Moore* v. *I. R. C.* [1933] 2 K.B. 126 no longer being pressed. The court were unanimous in holding that a direction given to his nominees by an absolute beneficial owner transferred the equitable interest from the

beneficial owner to the new beneficiaries otherwise than by way of assignment. The majority of the court (Morris and Ormerod L.JJ.) took the simple view that the word "disposition" must be given its normal meaning. Before the declaration Mr. Hunter possessed an equitable interest in the shares. Afterwards, and as a result of his declaration (had it been effective), he no longer had that equitable interest. He thus had disposed or got rid of his equitable interest and this it was held was a disposition within the meaning of section 53 (1) (c). The Master of the Rolls in a dissenting judgment considered that the word "disposition" was limited in its operation and noted that a declaration of trust by a legal owner of shares was not and never had been considered to be a disposition of an equitable interest within section 53. He then said (at 3 W.L.R., p. 56) "if, therefore, the word 'disposition' ought in its context to be so limited as to exclude such a declaration, it should also in my judgment . . . be construed so as not to cover a transaction such as the present which, though it may result in the destruction or defeasance of subsisting equitable rights, is not in form or (as I think) in reality apt or directed to constitute any dealing with those rights."

Leave to appeal to the House of Lords was granted.

It should be noted that although the argument by the Revenue based upon *Cohen and Moore* v. *I. R. C.* (*supra*) was abandoned in this case in the Court of Appeal, such abandonment would appear to be due to the absence of any finding by the Commissioners that in fact the oral declaration and declaration of trust formed all one transaction. It would still be open to the Commissioners to make such a finding in another case.

(See note *ante*, p. 302.)

Oughtred v. *I. R. C.* [1958] 3 W.L.R. 64; [1958] 2 All E.R. 443; [1958] T.R. 177 (C.A.)

Stamp duty—Purchase of reversion—Conveyance to absolute owner

Statutory provisions: Stamp Act, 1891, ss. 54, 55 and Sch. I; Law of Property Act, 1925, s. 53 (1) and (2).

Point: The Court of Appeal in a unanimous judgment reversed the decision of Mr. Justice Upjohn (noted at Vol. 22, p. 156, *ante*) in holding that transfers of shares from trustees to an absolute owner were liable to *ad valorem* duty as conveyances in the following circumstances. The shares were held by trustees upon trust for A for life and then to B absolutely. B agreed with the life tenant orally to exchange his reversionary interest in the settled shares for certain other shares owned absolutely by the life tenant. A deed of release to the trustees was executed by A, B and the trustees and on the same day the trustees transferred the settled shares to A. The operative part of the deed of release read "Now in consideration of the premises *and of the transfer to be made as aforesaid*" followed by a release and discharge to the trustees. It was argued by the taxpayer and accepted by Mr. Justice Upjohn that upon the oral agreement the equitable interest had passed from the reversioner to

the life tenant immediately upon the oral agreement for exchange, the reversioner becoming a constructive trustee of his interest for the life tenant upon that agreement being made, no writing being necessary for the passage of that equitable interest as section 53 (2) exempts the operation of constructive trusts from the need for writing imposed by the preceding subsection. The Court of Appeal found it unnecessary to determine this point, though expressed themselves as not prepared to accept his conclusion upon the effect of section 53. The court differed from the learned judge and reversed his decision on the ground that the transfers from the trustees to the life tenant completed the oral bargain made previously and thus constituted the conveyance upon the oral contract for sale and thus was a conveyance on sale of property within the meaning of section 54, Stamp Act, 1891.

Leave to appeal to the House of Lords was granted.

(See note *ante*, p. 301.)

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6. *PLANNING CASES*

By V. G. Wellings, M.A. (Oxon), Barrister-at-Law

Pyx Granite Co. v. *Ministry of Housing and Local Government* [1958] 2 W.L.R. 371; [1958] 1 All E.R. 625 (C.A.)

Development—need for permission—declaration—jurisdiction of High Court.—The High Court has jurisdiction to grant a declaration that a particular operation or use does not constitute or involve "development" within the meaning of the Act of 1947, or that planning permission is not required in respect of it. This proposition, which succeeded in the present case, has not in the past been doubted, but the point was taken that the effect of section 17 of the Act of 1947 was to deprive the courts of jurisdiction to grant such a declaration. Hodson L.J. took the view that, although there had been no application for a determination under that section whether permission was required in respect of the company's operations and although such an application was not compulsory, the fact that Parliament had provided a procedure which the developer could adopt if he so chose was sufficient to debar him from recourse to a declaration (*Boraclough* v. *Brown* [1897] A.C. 615, applied). The majority (Lord Denning and Morris L.J.) took the view, however, that the jurisdiction of the High Court was not to be taken away except by clear words and that there was nothing in section 17 of the Act of 1947 to bar recourse to a declaration. There are observations in the judgments of Lord Denning and Hodson L.J. that suggest that when the Minister has given a determination under section 17 recourse to the courts is indeed barred. See the article "Section 17 Determinations," to be published in the August issue of [1958] J.P.L.

The court was also asked to declare that conditions attached to a permission which had been granted by the Minister were invalid. This declaration was refused but from the observations of the court

it would seem that the court will grant such a declaration where the conditions are not fairly and reasonably related to the permitted development. Hodson L.J. thought that if any of the conditions were held to be invalid the permission would fall with it (*sed quaere*).

([1958] J.P.L. 442–445.)

Eastbourne Corporation v. *Fortes Ice Cream (Parlour)*
[1958] 2 W.L.R. 887; [1958] 2 All E.R. 276 (D.C.)

Appeal against enforcement notice—no jurisdiction in justices to quash on ground of no development.—On an appeal against an enforcement notice under section 23 (4) of the Act of 1947 the justices can quash the notice if satisfied (*inter alia*) that permission for the development to which the notice relates was granted under Part I of the Act or that no such permission was required in respect thereof. It is surprising if the justices, in a case where the reason that permission is not required is that there has not been any "development" cannot quash the notice on this ground also, but the court (Lord Goddard C.J. dissenting) so held. An interesting feature of the case was that *Keats* v. *L. C. C.* [1954] 1 W.L.R. 1357 was followed notwithstanding that that case was, in *Norris* v. *Edmonton Corporation* [1957] 3 W.L.R. 388, said to have been overruled by the House of Lords in *East Riding C. C.* v. *Park Estates (Bridlington)* [1957] A.C. 223. For a criticism of the present case see [1958] J.P.L. 439–441.

Fyson v. *Buckinghamshire C. C.*
[1958] 1 W.L.R. 634; [1958] 2 All E.R. 286 (D.C.)

Development—resumption of permitted use after long interruption —no material change in the use of the land.—Between 1943 and 1949 land had been used for storage purposes. From 1949 until 1956 the land stood idle and in 1956 the use for storage purposes was resumed. On an appeal against an enforcement notice alleging that the resumption constituted development the justices held that there had been no material change in the use of the land so that permission was not required.

Held: That this was a finding to which the justices could reasonably come. Donovan J. said: "It is said that certain provisions of the Act, notably section 12 (5) and proviso (c) will not make sense unless the decision of the justices in this respect is reversed. If that be so, it is a matter for Parliament. Problems under this Act would become even more difficult than they are already, and perhaps even insoluble if each time a construction had to be sought which would resolve all discord into song."

([1958] J.P.L. 516, 517.)

Attorney-General on the relation of Egham U. D. C. v. *Smith*
[1958] 3 W.L.R. 81 (High Court—Lord Goddard C.J.)

Use of land in defiance of planning control—injunction.—The Act of 1947 is an Act designed to confer a benefit on the public and if somebody shows by his conduct that he intends to avoid and break the Act the court has jurisdiction to grant an injunction to the Attorney-General, notwithstanding that the Act provides its own penalties for non-observance of its requirements. On the rather special facts of this case such an injunction was granted. The facts, roughly, were these: the developer would bring caravans onto one field and allow them to be used for residential purposes until either an enforcement notice was served or a prosecution brought. He would delay the notice taking effect for as long as possible by applying for planning permission which, because Egham was in the Green Belt, he had every reason to expect would be refused. He would then move his caravans (all the time increasing in number) to another field and start the procedure again and then to a third field and so on. This was not a case in which the developer could take advantage of the twenty-eight days permitted by the General Development Order since Class IV (2) of the Schedule to that Order had been abrogated in relation to Egham. Lord Goddard C.J. held that the facts showed an intention by the developer to use the machinery of the Act, not for making genuine applications for permission but for the purpose of delay, and to act in defiance of the Act for as long as he could.

([1958] J.P.L. 517–520; 73 L.Q.R. 506.)

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7. *MISCELLANEOUS*

Rayfield v. *Hands* [1958] 2 W.L.R. 851;
[1958] 2 All E.R. 194

Articles of association—enforcement between members—provision that directors should acquire shares—whether directors liable.—The instant case is of considerable practical importance as being yet another decision on the effect of the articles of association as constituting a contract. In Vol. 21, at p. 433, Dr. D. G. Rice discussed the legal nature of a share and, at p. 443, submitted that the balance of authority suggests that the memorandum and articles constitute a binding contract only between the members and the company, and not between the members *inter se* as well. The facts in the instant case were that the plaintiff was a shareholder in a company whose articles required him to inform the directors of his intention to transfer shares in the company, and the directors were obliged to acquire the shares at a fair value. The plaintiff notified the directors, who contended that they need not take and pay for the plaintiff's shares on the ground that the articles did not impose any such liability on them. The plaintiff then sued the directors and it was held that they were bound.

The judgment, unfortunately, is not very long and deals with a number of points. The court held that it was not necessary for the

plaintiff to be joined as a party to the action and that the article imposed an obligation on the defendants not as directors but as members of the company. The report does not say whether the directors had to hold qualification shares, but, even if they did, a director can be appointed before acquiring his qualification shares and, if a notice were served before such acquisition, it is a little difficult to see how any obligation could be imposed upon him as a member of the company. The much more interesting point, however, is whether there was or was not an obligation on the members as such. As Dr. Rice pointed out in his article and Vaisey J. in his judgment, there is a variety of views on the point and really it was a question of selecting which view to adopt. Vaisey J. preferred the dictum of Astbury J. in *Hickman* v. *Kent, etc., Sheepbreeders' Association* [1915] 1 Ch. 881, at p. 891, where he said: "The articles of association are simply a contract as between shareholders *inter se* in respect of their rights as shareholders. They are the deed of partnership by which the shareholders agree *inter se*." The learned judge also pointed out that by implication in *Dean* v. *Prince* [1954] Ch. 409, the Court of Appeal took the view that the Companies Act, 1948, s. 20, does constitute a contract between the members *inter se*.

THE LIBRARY

Urban Estate Management. Vol 1. Ownership, Rights and Obligations. 3rd ed. By W. A. Leach, f.r.i.c.s. The Estates Gazette, Ltd. lxiv, 454 and (index) 18 pp. (£2 5s.)

Lawyers have a tendency to look down their noses at books on legal subjects written by non-lawyers, often with some justification, but Mr. Leach is known to many lawyers as a member of the editorial board of the *Journal of Planning and Property Law*, and a writer who has a very wide knowledge of property law. This edition is more comprehensive than the second and there is now a really substantial body of case law cited. Written, no doubt, primarily for those engaged in estate management, there is a good deal that is rather elementary for the lawyer. On the other hand, the solicitor in private practice may well find the discussion of the Public Health Acts, Housing Acts and London Building Acts of considerable use—alas, there is no table of statutes—for there is really no satisfactory textbook dealing with these Acts reasonably comprehensively, and they are of growing importance. Mr. Leach has some helpful observations on preparing evidence for an application for the discharge or modification of restrictive covenants; and in many cases the outcome of the application will depend on the proper presentation of the surveyor's evidence. The profession of estate management has produced a number of excellent books on legal subjects, and they are often stimulating because of the different line of approach. Mr. Leach's book belongs to this class.

J. H. G.

The Elements of Drafting. 2nd ed. By E. L. Piesse, Solicitor (Victoria), and J. Gilchrist Smith, ll.d., Solicitor. Stevens & Sons, Ltd. xv and 119 pp. (12s. 6d.)

This little book on the art of drafting was universally welcomed on the publication of the first English edition. The authors' main aim is to explain the general principles which should be applied in drafting legal documents of all kinds with the object of avoiding ambiguity. They take the view that so far as possible a document should be understandable by the intelligent layman. They might have taken as an illustration of good modern drafting the Occupiers' Liability Act, 1957. They appear to underestimate the value of traditional styles. For example, registered land conveyancing calls for a simpler style than is yet customary for ordinary conveyancing. Articles of association and the rules of a pension scheme call for a less legalistic style. A distinction should be drawn between such documents, which should be reasonably understandable to laymen and should be punctuated, from documents such as conveyances, which, of necessity and properly, employ terms of art with meanings well established and known to lawyers. For the draftsmen, it is a book to be placed beside Fowler's *Modern English Usage* and Gower's *Plain Words*. Anyone who has not already got the first edition should get a copy of the second.

Freeman's Rights of Way. 4th ed. By J. F. GARNER, LL.M., Solicitor. The Solicitors' Law Stationery Society, Ltd. xvi, 79 and (index) 8 pp. (18s. 6d.)

This book consists of sixty-four pages of main text and an annotated copy of the Rights of Way Act, 1932. The English are not on the whole a litigious race, but for some reason the law reports bristle with cases on rights of way in all their aspects, so much so that it does not seem practicable to cover the ground adequately in so short a space. Within the strait-jacket imposed by size, the editor has done an adequate job and, for those straying into an unacquainted territory, there are useful finger-posts, but the publishers might consider giving the editor twice the space for the next edition.

We have also received:

Emmet on Title. 14th ed. First Supplement to February 28, 1958. By J. GILCHRIST SMITH, LL.D., Solicitor. The Solicitors' Law Stationery Society, Ltd. xviii and 104 pp. (15s.)—In addition to a thorough noting-up there is a very useful introduction setting out the principal developments since the publication of the main work.

Phillips' Probate Practice. First supplement to fifth edition. By D. C. SEALEY-JONES, LL.M., Solicitor. The Solicitors' Law Stationery Society, Ltd. 34 pp. (5s.)—Apart from the general noter-up, the text of the relevant parts of statutes passed subsequent to the main work, such as the Maintenance Agreements Act, 1957, and the Fees Order, 1958, and Costs Order, 1956, are set out. The two precedents for non-contentious wills are of considerable interest, both as to contents and amounts.

CORRESPONDENCE

To the Editor,
The Conveyancer and Property Lawyer

Rent Act, 1957: Withdrawal of Proposal Notice

Dear Sir,

I refer to the note on page 83 of the March/April issue of *The Conveyancer and Property Lawyer* in regard to the above topic.

From my increasing familiarity with the practical operation of the Rent Act, 1957, in the course of my duties, I find it quite impossible to accept the arguments put forward by the learned authors of the articles in question.

I should summarise the position as follows:

1. The local authority may not withdraw Form J once it is satisfied as to the merits of the tenant's application on Form I.
2. In practice, the local authority is "satisfied" for the purposes of Schedule I, para. 4 (2), when the report of its public health official has been accepted by the appropriate committee. There is thus no room for persuasion or interposition by the landlord after service of Form J by the local authority.
3. The correct procedure by the landlord is not to contest Form J and seek its re-service, but to complete Form K within the three-weeks period.
4. Once the requisite details of the Form G have been checked and the property inspected on behalf of the local authority as a result of the tenant completing Form I, there is no need for a further inspection between the service of Form J and the issue of Form L.
5. The attention of the learned authors referred to is respectfully directed to the important notes on the back of the prescribed forms, regarding the conditions in which the local authority *must* proceed to issue Form L.

With great respect, therefore, it seems to me that the authors take the more *un*practical and *un*realistic view of this intricate procedure under the 1957 Act and the Rent Restrictions Regulations, 1957.

The landlord's case is not assisted by attempts to short-circuit the Regulations.

Yours faithfully.
G. Washington Rolls
Assistant Solicitor to the Rotherham R.D.C.

Wickersley, April 30, 1958

[This view seems to be universally, or almost universally, accepted by local authorities, so much so that in one case when a landlord had done the work and notified the authority within the three weeks the authority nevertheless issued a certificate of disrepair because Form K had not been completed.—Editor.]

To the Editor,
The Conveyancer and Property Lawyer

Registered Land Conveyancing

Dear Sir,

I must express my disagreement with your view that most unbiased observers are satisfied that the Land Registry made out its case and that most practitioners

with experience of both prefer the registered (Vol. 21, p. 401). Perhaps I am merely biased after thirty years' practice in unregistered conveyancing but I should not regard taking land out of a lease and substituting another (cited by you as an example of the registry's facility) as occasioning any difficulty (and I think a good many estate agents would have a try at it) nor am I impressed that it "does not even cause the registrar to falter."

Admittedly my experience of the registered system is very limited, and of course building plots can be conveniently dealt with that way, but I suggest that a system which leaves so much in the discretion of the registrar—equitable rights for instance—is not one that should be forced compulsorily on the community, and if so good why is compulsion necessary?

In spite of the attempt to streamline conveyancing, it is still necessary to have Settled Land Act titles off the register.

Again, in a conveyance now before me there are four schedules of rights and covenants. Are these suitable for registration and if so how would they be dealt with? In another conveyance, the schedules consist of fifteen closely printed pages of which six are of rights and reservations, and yet if the land were in a compulsory area all these would somehow have to be provided for on a sale of the estate.

From the professional point of view the most serious side to the question is that of costs. At a recent sale of registered land, the estate agent's fee was £920, ours, acting for him, was £164, thereby depriving us of £180. How are we to keep up with other professions, much more with business people?

Yours faithfully,

Henry Potts.

Backford, May 9, 1958

[With respect, the question of remuneration is irrelevant to the efficiency or otherwise of registered conveyancing. On a recent purchase for under £3,000 the title went back to an Act of Attainder and an Act for the Restoration of Blood—interesting, but hardly conducive to any substantial net profit. Is not the proof of the pudding the increasing number of voluntary registrations? Compulsion is presumably necessary to ensure uniformity and, in any event, apart from builders do many clients really know whether registration is advantageous or not?—Editor.]